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1353

United States

Circuit Court of Appeals

For the Ninth Circuit.

1363

GEORGE E. JACKSON, Doing Business Under the
Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Arizona.

FILED

JUN 21 1923

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE E. JACKSON, Doing Business Under the
Trade Name and Style of SOUTHERN
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

TOWNSEND, STOCKTON & DRAKE, Phoenix,
Arizona,

JOS. A. MUSGROVE, 820 Trust & Savings Bldg.,
Los Angeles, Calif.,
Attorneys for Plaintiff in Error.

FREDERICK H. BERNARD, United States At-
torney, Tucson, Arizona,
Attorney for Defendant in Error.

In the District Court of the United States, for the
District of Arizona.

C—1872.

United States of America,
District of Arizona,—ss.

Information.

Violation of Sec. 3. Tit. 2. Act Oct. 28, 1919 (Nat.
Pro. Act). Importing, Transporting and Pos-
session of Intoxicating Liquor.

BE IT REMEMBERED, That Frederick H.
Bernard, Attorney of the United States, for the Dis-
trict of Arizona, who prosecutes in behalf and with
the authority of the United States, comes into court
on this 4th day of January, A. D. 1923, in the No-
vember, 1922, term thereof, and for the United
States gives the Court to understand and be in-
formed that one Jewel A. Bostick, on the 10th day
of April, A. D. 1922, and within the said District
of Arizona, did wilfully, unlawfully and knowingly

import into the United States of America, from the United States of Mexico, certain intoxicating liquor, to wit, one hundred sixty-two quarts of tequila, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the said Frederick H. Bernard, United States Attorney as aforesaid, gives the Court to further understand and be informed, that Jewel A. Bostick, on the 10th day of April, A. D. 1922, and within the said District of Arizona did wilfully and unlawfully transport in a certain automobile, to wit, a Hudson Supersix Touring automobile, bearing Arizona 1922 license No. 2-1807, engine No. 44601, Model J-6879, certain intoxicating liquor, to wit, approximately one hundred and sixty-two quarts of tequila, from a certain point, the exact location of which is to affiant unknown, to a certain point approximately sixteen miles north of Nogales, Arizona, towards Tucson, Arizona, in the State and District of Arizona, the exact location of which is to affiant unknown, he, the said Jewel A. Bostick then and there having no legal permit to so transport the [1*] said intoxicating liquor, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the said Frederick H. Bernard, United States Attorney as aforesaid, gives the Court to further understand and be informed that Jewel A.

*Page-number appearing at foot of page of original certified Transcript of Record.

Bostick, on the 10th day of April, A. D. 1922, and within the said District of Arizona, did wilfully and unlawfully possess one hundred and sixty-two quarts of intoxicating liquor, to wit, tequila, which said intoxicating liquor was fit for beverage purposes, he, the said Jewel A. Bostick then and there having no legal permit to so possess the said intoxicating liquor, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

That the said defendant has been bound over by a United States Commissioner for this District, and the record of the proceedings had before said Commissioner are on file in this court, and are made a part of this information, and the affidavit thereto.

WHEREFORE, the said Frederick H. Bernard, United States Attorney for the District aforesaid, prays the consideration of this Court here in the premises and that due process of law may be awarded against the said Jewel A. Bostick, defendant, in this behalf, to make his answer to the United States touching and concerning the premises.

Dated at Tucson, Arizona, this 4th day of January, A. D. 1923.

FREDERICK H. BERNARD,
United States Attorney for the District of Arizona.

Frederick H. Bernard, being first duly sworn, on oath deposes and says: That he has read the foregoing information, and knows the contents thereof; that the matters and things therein contained are true as he verily believes.

FREDERICK H. BERNARD.

Subscribed and sworn to before me this 4th day of January, A. D. 1923.

C. R. McFALL,
Clerk District Court of the United States for the
District of Arizona.

[Endorsed]: United States vs. J. A. Bostick.
Information. Filed Jan. 4, 1923. C. R. McFall,
Clerk, United States District Court for the District
of Arizona. [2]

UNITED STATES OF AMERICA.

In the District Court of the United States, for the
District of Arizona.

At the November Term, 1922, held at Tucson, in said
District, on January 29, 1923—Hon. WM. H.
SAWTELLE, District Judge, Presiding.

Case No. C—1872 (TUCSON).

UNITED STATES OF AMERICA,

vs.

JEWEL A. BOSTICK,

Defendant.

Judgment and Commitment.

The defendant, Jewel A. Bostick, is present in person, and with his counsel, George O. Hilzinger, Esq.

The United States Attorney for the District of Arizona is present on behalf of the United States. And this being the time heretofore fixed for passing judgment on the defendant aforesaid, the said de-

fendant is now duly informed by the Court of the nature of the charge contained in the Information against him for the crime of wilfully, unlawfully and knowingly importing certain intoxicating liquor, in violation of Section 3, Title II, National Prohibition Act, as charged in the first count of said information; and of wilfully and unlawfully transporting certain intoxicating liquor, in violation of said section, title and act, as charged in the second count of said information; of his arraignment at the bar of this court on said charges, and of his plea of guilty thereto heretofore entered.

The said defendant is now asked if he has any legal cause to show why judgment should not be pronounced against him; and no sufficient cause being shown or appearing to the Court, the Court renders its judgment, as follows:

That, whereas you, Jewel A. Bostick, having been duly convicted in this Court of the crime aforesaid, it is found by the Court that you are so guilty of said crime.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, and the judgment and sentence of the Court is that you, Jewel A. Bostick, be fined upon the first count of the information the sum of \$500.00; and that you shall stand committed to the County Jail of Pima County, Arizona, until said fine is paid or until you are discharged by due process of law. [3]

It is the further judgment of the Court that you be fined upon the second count of the information the sum of \$500.00; that when you shall have paid

the fine assessed on the first count of the information or shall have been discharged from custody by due process of law as to said fine, you then and thereupon shall be committed to said jail until you pay the fine assessed on the second count of the information, or until otherwise discharged by due process of law.

Commitment under the first count herein to date from January 25, 1923.

The said defendant is now remanded to the custody of the United States Marshal for said district, to be by him delivered into the custody of the proper officer of said jail.

AND IT IS FURTHER ORDERED, that a certified copy of this judgment shall be sufficient warrant for the said Marshal to take, keep, and safely deliver the said defendant into the custody of the proper officers of said jail, and a sufficient warrant for the officers of said jail to keep and imprison the said Jewel A. Bostick. [4]

November, 1922, Term—TUCSON.

In the District Court of the United States, for the
District of Arizona.

Hon. WILLIAM H. SAWTELLE, United States
District Judge, Presiding.

Minute Entry of January 25, 1923.

No. C—1872 (TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEWEL A. BOSTICK,

Defendant.

**Minutes of Court—January 25, 1923—Arraign-
ment and Plea.**

The defendant, Jewel A. Bostick, is present in person and with his counsel, George O. Hilzinger, Esquire. Said defendant is now duly arraigned on the charge contained in the information **herein**, and being called on to plead thereto, enters a plea of Guilty to the counts of said information charging unlawful transportation and importation of intoxicating liquor. Now, on motion of the United States Attorney, the count of said information charging unlawful possession of intoxicating liquor is hereby dismissed. The defendant is committed to the custody of the Marshal to await sentence. [5]

November, 1922, Term—TUCSON.

In the District Court of the United States, for the
District of Arizona.

Hon. M. T. DOOLING, United States District Judge
For the Northern District of California,
Specially Assigned, Presiding.

Minute Entry of March 15, 1923.

No. C—1872 (TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. BOSTICK,

Defendant.

**Minutes of Court—March 15, 1923—Hearing of
Petition of Southern Arizona Auto Company.**

The petition of the Southern Arizona Auto Company for return of the automobile seized in this case comes on regularly for hearing this day. The United States Attorney appears for the Government, and no one appears for the petitioner.

The petition is submitted, and by the Court taken under advisement. [6]

November, 1922, Term—TUCSON.

In the District Court of the United States, for the
District of Arizona.

Hon. M. T. DOOLING, United States District Judge
For the Northern District of California,
Specially Assigned, Presiding.

Minute Entry of April 20, 1923.

No. C—1872 (TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. BOSTICK,

Defendant.

**Minutes of Court—April 20, 1923—Order Denying
Petition of Southern Arizona Auto Company.**

The petition of George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, for the return of the automobile seized in this case, having been submitted to the Court, and by the Court taken under advisement, and the Court having fully considered the same, and being advised in the premises, does now ORDER that the said petition be, and the same is hereby denied, and that the usual order of sale issue in this case. [7]

In the District Court of the United States, for the
District of Arizona.

No. C—1872 (TUCSON).

UNITED STATES OF AMERICA

vs.

J. A. BOSTICK.

Order of Sale.

The defendant, Jewel A. Bostick, having heretofore, to wit, on the 25th day of January, A. D. 1923, entered his plea of guilty of transporting intoxicating liquor in violation of Section 3, of Title II of the Act of Congress, approved October 28th, 1919, known as the Federal Prohibition Act, and the Court on said 25th day of January, A. D. 1923, having determined upon an examination of the witnesses that the said intoxicating liquor was, by the said Jewel A. Bostick, transported in and by means of a certain automobile, to wit, a Hudson Supersix touring automobile, bearing Arizona 1922 license number 2-1807, engine number 44601, model J-6879, and it further appearing to the Court that the said automobile while so transporting the said intoxicating liquor was, by virtue of the power conferred upon them by law, seized by United States Custom Inspectors R. J. Rollins and E. T. Richards, and thereafter turned over to M. E. Cassidy, United States Federal Prohibition Director for the State of Arizona, and is now in his possession.

NOW, THEREFORE, it is ordered that the said United States Federal Prohibition Director for the State of Arizona, M. E. Cassidy, deliver the said automobile to the United States Marshal for the District of Arizona; and

IT IS FURTHER ORDERED, That the said automobile be, by the said United States Marshal for the District of Arizona, sold [8] at public auction at the front door of the Federal Court Building at Tucson, Arizona, at ten o'clock A. M. on Saturday, June 9th, 1923.

IT IS FURTHER ORDERED, That the said United States Marshal publish in the "Arizona Daily Star" of Tucson, Arizona, his notice of such sale once each week for two consecutive weeks, the last publication of said notice to be at least three days before the date of said sale, and post said notice in at least three public places in the said City of Tucson, Arizona, at least three days before said sale; and make due return on what he has done pursuant to this order, and of the proceeds of said sale.

WITNESS, the Honorable WILLIAM H. SAWTELLE, Judge of said District Court, and the seal of said Court, at Tucson, in said District, this 22d of May, A. D. 1923.

[Seal]

C. R. McFALL,
Clerk of Said Court.
By R. C. McAllister,
Deputy. [9]

May Term 1923—TUCSON.

In the District Court of the United States for the
District of Arizona.

Hon. WILLIAM H. SAWTELLE, United States
District Judge, Presiding.

Minutes Entry of May 25, 1923.

No. C—1872—(TUCSON).

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JEWEL A. BOSTICK,
Defendant;

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,
Intervener.

**Minutes of Court—May 25, 1923—Order Fixing
Bond on Writ of Error.**

It appearing to the Court that George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, desires to prosecute a writ of error from the order denying his petition,—

IT IS ORDERED that the bond of the said George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, on said writ of error, be fixed at the sum of

\$500.00, to be approved by the Judge of this court, and that upon the giving of such bond and its approval by the Judge of this court, that further proceedings in this case be stayed pending determination of said writ of error. [10]

In the District Court of the United States for the
District of Arizona.

No. G. J.—1386.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. A. BOSTICK,
Defendant;

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,
Intervener.

Petition in Intervention—Third Party Claim.

Comes now the above-named intervener, and for cause of intervention and for grounds of relief herein alleges:

I.

That this intervener is and at all the times herein mentioned was doing business under the trade name and style of Southern Arizona Auto Company, with his principal place of business located in the City of Douglas, County of Cochise, State of Arizona,

and that the business in which this intervener is and was so engaged is the buying and selling of automobiles as a retail dealer.

II.

That the defendant, J. A. Bostick, is charged by information filed herein with the transportation of intoxicating liquor in the automobile hereinafter described, in violation of Section 3, of Title II of the National Prohibition Act of October 28, 1919; that at the time of the arrest of said defendant upon said charge, the arresting officers seized and took from said defendant said automobile on the charge that said automobile was being used by the defendant for the unlawful transportation of intoxicating liquor, and which said automobile is described as follows, to wit:

One Hudson Touring Automobile, Frame number J-6879, Motor number 44601; that said automobile is now in the possession of the Federal Prohibition [11] Director for the State of Arizona, and is held by him subject to the order of this Court.

III.

That the automobile described in Paragraph II hereof was not at the time that it was so seized, and is not now, the property of said defendant; that on the 6th day of April, 1922, said automobile was sold conditionally by this intervener to the said defendant, in accordance with the terms and provisions of a certain conditional sales contract, in writing, which was executed and delivered on said date by this intervener as seller, and by said defendant as

purchaser, a true and correct copy of which said contract is hereto attached, marked Exhibit "A," and made a part of this petition; that the purchase price of said automobile was Seven Hundred Dollars (\$700.00), of which amount the sum of \$150.00 was paid on the date of said contract, and the balance of \$550.00, with interest thereon at the rate of ten (10) per cent per annum, as provided by said contract, was to be paid to this intervener in five monthly installments, as follows:

\$150.00 on the 6th day of May,	1922
\$100.00 on the 6th day of June,	1922
\$100.00 on the 6th day of July,	1922
\$100.00 on the 6th day of August,	1922
\$100.00 on the 6th day of September,	1922

That it is expressly provided in said contract, Exhibit "A," that the title to said automobile shall be and remain vested in the seller until the whole purchase price with interest thereon, as aforesaid, has been paid, and it is further provided in said contract that in the event the purchaser fails to pay any of said installments, or the interest thereon, when due, or removes or allows said automobile to be removed from the State of Arizona, without the written consent of the seller, or makes default in any of the terms or conditions of said contract, the seller shall have the right immediately, at his option, to retake possession of said automobile wherever the same may be found; and it is further provided [12] by said contract that in the event of any such default by the purchaser, the payments theretofore made by the purchaser shall be

forfeited as rental for the use of said automobile; and it is also provided in said contract that time is the essence of the contract.

It is also further provided in said contract that the seller is authorized to insure said automobile against damage or loss by fire or theft, as the interest of the seller may appear, at the cost and expense of the purchaser, and that if the purchaser fails to pay such insurance premiums when due, the seller may, at his option, pay such premiums and add the amount thereof to the purchase price.

IV.

This intervener further alleges that when said contract, Exhibit "A," was entered into, as aforesaid, the said defendant, J. A. Bostick, paid to this intervener the cash payment of \$150.00, but has failed, refused and neglected to make any other or further payments to apply on the purchase price of said automobile; that said defendant, as such purchaser, has made default and has failed, refused and neglected to make the payment of \$150.00 which was due and payable on May 6th, 1922, and has likewise failed, refused and neglected to make the four payments, or any of the four payments of \$100.00 each which became due and payable on the 6th days of June, July, August and September, 1922, and there is now due to this intervener from the said defendant, J. A. Bostick, the sum of \$550.00 of the purchase price of said automobile, and the sum of \$28.50, which latter amount this intervener paid in premiums for the insurance on said automobile against damage or

loss by fire or theft, and which said amount of insurance premiums so paid by this intervener, the said defendant has failed, refused and neglected to pay, and there is therefore due this intervener from said defendant, under the terms and conditions of said contract, the total [13] sum of \$578.50, all of which is unpaid, and no part thereof has been paid.

That by reason of said default, the said defendant, J. A. Bostick, as purchaser of said automobile, has forfeited and lost his equitable interest in and to said automobile, and all of his rights to the possession thereof, and to the payments made thereon, and by reason thereof this intervener elects to declare a forfeiture of each and all of the rights, title and interest of said defendant in and to said automobile, and elects to retake possession of said automobile, in accordance with the terms of said contract; that this intervener at all the times herein mentioned was and now is the sole owner of the legal title to said automobile, and for the reasons herein stated is now entitled to the possession thereof, and in order to obtain such possession offers to pay any just charges for storage and other costs and expenses that may be required of him by the Court.

V.

That a true and correct statement of the account between this intervener as seller, and the said defendant, J. A. Bostick, as purchaser of said automobile, in accordance with the terms of said contract, Exhibit "A," and in accordance with the facts, is as follows:

Purchase Price of Automobile	\$700.00
Insurance Premium paid by Intervener	28.50

\$728.50

April 6, 1922—Cash payment	150.00
------------------------------------	--------

Balance due intervener. \$578.50

VI.

And this intervener further alleges that if the defendant, J. A. Bostick, transported any intoxicating liquor in said automobile, as he is charged with having done in the information filed herein, any such transportation of intoxicating liquor was not done with the knowledge, consent or connivance of this intervener [14] or of any employee, servant or agent of this intervener.

WHEREFORE, this intervener files this his third party claim in the above-entitled action, and respectfully petitions this Honorable Court to make and enter an order herein that the said automobile be released and returned to the possession of this intervener, and for such other and further relief as may be just and adequate in the premises.

JOSEPH MUSGROVE,

By F. O. McGIRR,

TOWNSEND, STOCKTON & DRAKE,

By HENDERSON STOCKTON,

Attorneys for Intervener.

United States of America,
State of Arizona,
County of Cochise,—ss.

George E. Jackson, being first duly sworn, upon his oath deposes and says: That he is the proprietor and owner of the Southern Arizona Auto Company, and is the intervener herein; that he has read the above and foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information and belief, and as to those matters that he believes the same to be true.

GEO. E. JACKSON,
Intervener.

Subscribed and sworn to before me this 30th day of September, 1922.

[Seal] J. A. CALVERT,
Notary Public in and for the County of Cochise,
State of Arizona.

My commission expires May 5, 1924. [15]

Exhibit "A."

Copies of Original Contracts.

SOUTHERN ARIZONA AUTO COMPANY.

GEO. E. JACKSON, Proprietor.

CONTRACT No. —.

THIS AGREEMENT, made and entered into this 6th day of April,, A. D. 1922, by and between

the SOUTHERN ARIZONA AUTO CO., GEO. E. JACKSON, Prop., of Douglas, Arizona, party of the first part, hereinafter called the Seller, and J. A. BOSTICK, 722 E. Helen St. of Tucson, Arizona, party of the second part, hereinafter called the Purchaser:

WITNESSETH, That the Seller hereby agrees to sell to the purchaser, and the purchaser hereby agrees to buy from the seller, at the price and upon the terms and conditions hereinafter mentioned, that certain automobile described as follows, to wit:

1 Hudson Car (Used) Frame #J6879 Motor #44601.

The total purchase price of said automobile is the sum of Seven hundred and no/100 Dollars (\$700.00), payable as follows:

The sum of One hundred fifty and no/100 Dollars (\$150.00) cash, the receipt whereof is hereby acknowledged by the seller, and the balance in installments, as follows:

The sum of One hundred fifty and no/100 Dollars (\$150.00), on the 6th day of May A. D. 1922, with interest from date hereof at the rate of 10 per cent per annum, until paid, interest payable with each note.

The sum of One Hundred and no/100 Dollars (\$100.00) on the 6th day of June A. D. 1922, with interest as aforesaid.

The sum of One hundred and no/100 Dollars (\$100.00) on the 6th day of July A. D. 1922, with interest as aforesaid.

The sum of One hundred and no/100 Dollars (\$100.00) on the 6th day of August A. D. 1922, with interest as aforesaid.

The sum of One hundred and no/100 Dollars (\$100.00) on the 6th day of September A. D. 1922, with interest as aforesaid.

which said deferred payments are represented by 1-5 payment certain promissory notes bearing even date herewith, bearing interest at 10 per cent per annum, executed by the said party of the second part, payable to the order of the party of the first part herein.

It is expressly understood and agreed by and between the parties hereto as follows:

1. That the title of said automobile shall be and remain vested in the seller until the whole purchase price, with interest thereon as aforesaid, has been paid, but that the title thereto shall become vested in the purchaser whenever full payment has been made as above provided.

2. That the purchaser shall pay, when the same become due and payable, all taxes and licenses assessed or levied against or on account of said automobile.

3. The seller is hereby authorized to insure and keep insured during the life of this agreement, the said automobile, against damage to, or loss of the same by fire or theft, as the interest of the seller may appear, and to the extent of at least the sum of Five hundred fifty and no/100 Dollars (\$550.00) at the cost and expense of the purchaser, and if the purchaser fails to pay such insurance premiums

when due, the seller may, at his option, pay such premiums and add the amount thereof to the purchase price.

4. The purchaser shall be entitled to the possession of said automobile, but within the State of Arizona only, until default has been made in making any of the payments of principal or interest as hereinbefore provided, or in any of the terms or conditions of this agreement.

5. That the purchaser shall not, without the written consent of the seller, remove or allow said automobile to be removed from the State of Arizona, until full payment therefor is made, as herein provided.

6. That in the event the purchaser fails to pay any of said installments, or the interest thereon, when due; or removes or allows said automobile to be removed from without the State of Arizona, without the written consent of seller; or makes default in any of the terms or conditions of this agreement, the seller shall have the right immediately at its option, to retake possession of said automobile wherever the same may be found, and have the right to enter into and upon any premises whatsoever in which or upon which said automobile may be situated in order to recover possession thereof; and all payments theretofore made by the purchaser shall be forfeited as rental for the use of said automobile.

7. That upon full payment of said purchase price, and interest, by the purchaser, in accordance with the provisions of this agreement, the seller

shall and will, make, execute and deliver to the purchaser a bill of sale conveying title to said automobile.

8. That time is the essence of this contract.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above mentioned.

EXECUTED IN TRIPLICATE.

SOUTHERN ARIZONA AUTO CO.,

GEO. E. JACKSON, Prop.

By GEO. E. JACKSON,

(Prop.)

J. A. BOSTICK.

Witness:

W. L. WETZEL,

1300-7th St.

Exhibit "A." [15 $\frac{1}{4}$]

[Endorsements]: (On cover:) Petition in Intervention. Third Party Claim.

Received copy of the within this 2d day of October, 1922.

FRANCIS D. CRABLE,

Asst. U. S. Attorney,

Attorney for United States.

Filed Oct. 2, 1922. C. R. McFall, Clerk. By M. R. Malcolm, Deputy. Messrs. Townsend, Stockton & Drake, Phoenix, Arizona. Joseph Musgrove, Lawyer, 820 Trust and Savings Building, Main 771, Los Angeles, California, Attorney for Intervener. [15 $\frac{1}{2}$]

In the District Court of the United States for the
District of Arizona.

No. C—1872.

THE UNITED STATES OF AMERICA

vs.

J. A. BOSTICK,

Defendant;

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,

Intervener.

Opinion.

FREDERICK H. BERNARD, Esq., United States
Attorney, Attorney for the United States.

TOWNSEND, STOCKTON & DRAKE, Attorneys
for Intervener.

On April 6th, 1922, George E. Jackson, intervener *here*, sold to J. A. Bostick an automobile for \$700.00 receiving \$150.00 as the first payment thereon, and retaining title to the machine until the remainder of the purchase price was paid in monthly installments, the last of which was due on September 6th, 1922. The machine was delivered to Bostick on April 6th, with full dominion over it, the only restriction upon its use provided for being a condition that he should not remove the machine from the State of Arizona. On April 10th, Bostick was arrested while unlawfully transporting liquor in the

automobile, and the automobile having been seized, upon Bostick's conviction, is now subject to sale by the Court. Jackson, the seller, by intervention now claims the machine, as owner, and asks that it, or the proceeds of the sale, be turned over to him, for the reason that he had no knowledge that the machine was used, or was to be used in the unlawful transportation of liquor. [16]

In the case of U. S. vs. Montgomery, recently decided in this court, it was held that one who retaining title in himself, delivers to another upon conditional sale possession of an automobile with absolute control and dominion over it, may not recover it from the Government after its seizure in the unlawful transportation of liquor by showing that such transportation was without his knowledge or consent. In deciding that case the Court said:

"Section 26 of the National Prohibition Law provides: Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile * * * and shall arrest any person in charge thereof. The Court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officers making the sale * * * shall pay all liens, according to their priority, which are established as being *bona fide* and as having been created with-

out the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor.

It is to be observed that the Court shall order a sale of the car 'unless good cause to the contrary is shown by the owner.' What constitutes such 'good cause' on the part of the owner is nowhere specified, but as to a lienor it is declared sufficient to show that the lien was *bona fide* and created without the lienor having any notice that the vehicle was being used or was to be used in the illegal transportation of liquor. The difference between the provisions applicable to owners and those applicable to lienors is significant. It is not unreasonable to suppose that Congress had in mind the fact that an owner may determine who shall have the use of the vehicle, and thus in a measure control such use, while a lienor may not, because he is at no time entitled to its possession. It seems therefore to me that the 'good cause' required to be shown by the owner means something more than the lack of notice of illegal use required on the part of the lienor. I am therefore of the opinion that an owner who while retaining title in himself delivers a car on conditional sale with power to use it in any way that the buyer may desire cannot escape a forfeiture if the buyer use it unlawfully, by claiming that such unlawful use was without his knowledge. His

remedy is not against the Government by reclaiming the car, but against the buyer by collecting the remainder of the purchase price. An owner may show 'good cause' if he shows that the car was taken and used without his knowledge or consent, but where he turns it over to another for a price giving absolute control to such other, he is not in a position to show 'good cause' against a forfeiture, if the car be seized while unlawfully used in the transportation of liquor, by [17] asserting that such use was without his knowledge. Any other construction of the statute would ignore a distinction which the law itself seems to make."

To what was then said I have only this to add: when Congress provided that the owner must show "good cause" without defining what would constitute such good cause, it either intended that the Trial Court should have the discretion to say in each case whether "good cause" appeared, or it intended that there should be a long period of uncertainty in the application of this provision until the meaning of the words took shape from the various decisions of the Circuit Courts of Appeals and the Supreme Court. In the case of the United State vs. Kane, 273 Fed. 275 (a conditional sale), Judge Bourquin took the former view, declaring "good cause is a term that cannot be reduced to legal certainty, and vests discretion in the Court when it has statutory authority to do a thing on good cause shown."

He also held in the same case as follows: "Even a lienor secures no relief because not involved in the offense, but only where he had no knowledge, when the lien was created, that the offense was contemplated; and an owner, with more control, can justly be held to greater accountability."

In either view I adhere to the decision in the Montgomery case:

1. Because I believe the statute requires more of the owner than of the lienor, and,

2. If the Court has the discretion, I believe it should be exercised against those who deliver the absolute and unrestricted possession to another upon conditional sale, while retaining title so as to avoid foreclosures, and enable them without going into court to forfeit all payments already made to them. [18]

It is to be further observed that the owner, by showing good cause, prevents the sale of the machine. It is only the lienor who can claim the proceeds after sale. So that the owner on conditional sale would have the machine returned to him, no matter how much has been paid thereon, or how little is due, and the interest of a defendant in the machine would thus be forfeited to the seller instead of to the Government. Sellers may avoid the difficulties presented by this construction of the statute by transferring title and taking a lien, in which case the interest of a defendant may be forfeited to the Government, and the rights of the lienor protected.

The petition of the intervener herein is therefore denied, and the automobile in question will be sold in the usual way.

April 20th, 1923.

M. T. DOOLING,
Judge.

At the request of claimant the Court now finds as a fact that claimant had no knowledge that the automobile in question was used, or was to be used in the unlawful transportation of liquor.

May 3, 1923.

M. T. DOOLING,
Judge.

[Endorsed]: Opinion and Order Denying Petition of Intervener. Filed Apr. 20, 1923. C. R. McFall, Clerk United States District Court for the District of Arizona. By R. C. McAllaster, Deputy Clerk. [19]

In the District Court of the United States for the
District of Arizona.

No. C—1872.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. A. BOSTICK,
Defendant;

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,
Intervener.

Petition for Writ of Error.

To the Honorable WM. H. SAWTELLE, Judge of
the District Court aforesaid,

Now comes George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, intervener above named, by his attorneys, and respectfully shows that on the 20th day of April, 1923, the Court denied the petition of intervener and entered judgment ordering the automobile involved in the above-named proceeding to be sold in the usual manner without recognition of intervener's right to a return of the same, or right in and to any proceeds from the sale of the same, notwithstanding that the Court found that intervener was the conditional vendor of said automobile and that the intervener had no knowledge that said automobile was used or was to be used in the unlawful transportation of liquor.

Your petitioner, feeling himself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided. [20]

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, California, in said Circuit, for the correction of the errors complained of and herewith as-

signed, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

JOSEPH MUSGROVE.

By EARL F. DRAKE,
TOWNSEND, STOCKTON & DRAKE.

By EARL F. DRAKE,
Attorneys for Petitioner in Error.

[Endorsed]: Received copy of foregoing petition June 1, 1923.

F. H. BERNARD,
U. S. Attorney.

Filed May 26, 1923. C. R. McFall, Clerk United States District Court for the District of Arizona. [21]

In the District Court of the United States for the
District of Arizona.

No. C—1872.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. A. BOSTICK,
Defendant;

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,
Intervener.

Assignments of Error.

Now comes George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, plaintiff in error in the above numbered and entitled cause, and in connection with his petition for a writ of error in this cause, assigns the following errors which the plaintiff in error avers occurred on the trial thereof, and upon which he relies to reverse the judgment entered herein as appears of record;

That the Court erred in denying the petition of the intervener, plaintiff in error herein, and in ordering the automobile involved in these proceedings sold without recognition of any right of plaintiff to a return of the same, or in or to any of the proceeds thereof, notwithstanding the fact that the Court found that the intervener was the condit-

ional vendor of said automobile, and had no knowledge that said automobile was used or was to be used in the unlawful transportation of liquor.

JOSEPH MUSGROVE.

By EARL F. DRAKE,
TOWNSEND, STOCKTON & DRAKE.

By EARL F. DRAKE,
Attorneys for Intervener and Plaintiff in Error.

[Endorsed]: Received copy of foregoing assignments of error, June 1, 1923.

F. H. BERNARD,
U. S. Attorney. [22]

Filed May 26, 1923. C. R. McFall, Clerk United States District Court for the District of Arizona. [23]

In the District Court of the United States for the District of Arizona.

No. C—1872.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. A. BOSTICK,

Defendant;

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,

Intervener.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, as principal, and National Surety Company, as surety, are held and firmly bound unto The United States of America in the full and just sum of Five Hundred (\$500.00) Dollars, to be paid to the said The United States of America, its attorneys, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors, and administrators jointly and severally by these presents.

Signed and dated this the 25th day of May, A. D. 1923.

WHEREAS, lately at a regular term of the District Court of the United States, for the District of Arizona, sitting at Tucson, in said District, in a suit pending in said Court between The United States of America, as plaintiff, and J. A. Bostick, as defendant, and George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, as intervener, cause No. C—1872, on the law docket of said Court, final judgment was rendered against the said George [24] E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, and his petition was denied, and the said George E. Jackson has obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment of the said Court in the aforesaid suit,

and F. H. Bernard, Esquire, United States District Attorney, on behalf of the said United States of America, defendant in error, was signed and filed in said cause a written waiver of service of citation requiring the defendant in error to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco in the State of California, according to law, within thirty days from date hereof.

Now the condition of the above obligation is such that if the said George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, shall prosecute his writ of error to vacate and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

GEORGE E. JACKSON.

By TOWNSEND, STOCKTON & DRAKE,

Attorneys-in-fact,
Principal.

NATIONAL SURETY COMPANY,

By B. C. STURGES,
Attorney-in-fact,
Surety.

Approved this 26 day of May, 1923.

WM. H. SAWTELLE,
United States Judge.

[Endorsed]: Received copy of foregoing bond
June 1, 1923.

F. H. BERNARD,
U. S. Attorney.

Filed May 26, 1923. C. R. McFall, Clerk United States District Court for the District of Arizona. [25]

In the Circuit Court of Appeals of the Ninth Circuit.

No. —.

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error (Copy).

United States of America,—ss.

The President of the United States, WARREN G. HARDING, to the Honorable Judge of the District Court of the United States, for the District of Arizona, GREETINGS:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, plaintiff in error, and The United States of America, defendant in error, a manifest error has happened to the damage of George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, plaintiff in error,

as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and [26] there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this the 26th day of May, 1923.

[Seal] C. R. McFALL,
Clerk of the United States District Court for the
District of Arizona.

Allowed this the 26 day of May, 1923.

WM. H. SAWTELLE,
United States Judge.

Return on Writ of Error.

The answer of the Judge of the District Court of the United States, for the District of Arizona, to the within writ of error:

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal] C. R. McFALL,
Clerk U. S. District Court, District of Arizona.

[Endorsed]: Received copy of foregoing writ
June 1, 1923.

F. H. BERNARD,
U. S. Attorney.

Filed May 26, 1923. C. R. McFall, Clerk United
States District Court for the District of Ari-
zona. [27]

In the District Court of the United States for the
District of Arizona.

No. C—1872 (TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. BOSTICK,

Defendant;

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,

Intervener. /

Citation (Copy).

To the United States of America, Defendant in Error:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, California, on the 25th day of June, A. D. 1923, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the District of Arizona, wherein George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WM. H. SAWTELLE, U. S. District Judge, Dist. of Arizona, this 31st day of May, A. D. 1923.

WM. H. SAWTELLE,
United States District Judge.

I hereby, this 31st day of May, A. D. 1923, accept due personal service of the foregoing citation on behalf of the United States of America, defendant in error.

FREDERICK H. BERNARD,
Attorney for the United States.

[Endorsed]: Filed May 31, 1923. C. R. McFall,
Clerk United States District Court for the District
of Arizona. [28]

In the District Court of the United States for the
District of Arizona.

No. C—1872.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. A. BOSTICK,
Defendant;

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,
Intervener.

**Praecipe Setting Forth Parts of Record to be In-
corporated and Attached to Return on Writ of
Error.**

To the Clerk of the United States District Court
for the District of Arizona:

Please take notice that you are requested to in-
corporate and attach to the return on the writ of
error in the above action the following papers
and parts of the record in said cause, to wit:

- (1) Criminal information against the above-named
defendant and any plea or answer thereto.
- (2) Judgment of conviction and record as to pay-
ment of fine.

- (3) All minute entries of clerk pertaining to the proceedings in said criminal proceeding and the proceedings with reference to confiscation of automobile.
- (4) Petition in intervention of George E. Jackson, third party claim and any answer or pleading thereto.
- (5) Opinion and judgment of Court in connection therewith.
- (6) Petition for writ of error.
- (7) Assignments of error.
- (8) Bond and approval.
- (9) Allowance of writ of error. [29]
- (10) Writ of error.
- (11) Citation in error.
- (12) Clerk's certificate.

JOSEPH MUSGROVE.

By EARL F. DRAKE.

TOWNSEND, STOCKTON & DRAKE.

By EARL F. DRAKE.

[Endorsed]: Received copy of foregoing praecipe June 1, 1923.

F. H. BERNARD,

U. S. Attorney.

Filed May 30, 1923. C. R. McFall, Clerk United States District Court for the District of Arizona. [30]

In the District Court of the United States for the
District of Arizona.

No. C—1872 (TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. A. BOSTICK,

Defendant;

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,

Intervener.

Citation (Original).

To the United States of America, Defendant in
Error:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, California, on the 25th day of June, A. D. 1923, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected

and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WM. H. SAWTELLE, U. S. District Judge, Dist. of Arizona, this 31st day of May, A. D. 1923.

WM. H. SAWTELLE,
United States District Judge.

I hereby, this 31st day of May, A. D. 1923, accept due personal service of the foregoing citation on behalf of the United States of America, defendant in error.

FREDERICK H. BERNARD,
Attorney for the United States.

Filed May 31, 1923. C. R. McFall, Clerk
United States District Court for the District of
Arizona.

—————

In the Circuit Court of Appeals of the Ninth Circuit.

No. —.

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error (Original).

United States of America,—ss.

The President of the United States, WARREN G. HARDING, to the Honorable Judge of the District Court of the United States for the District of Arizona, GREETINGS:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, plaintiff in error, and the United States of America, defendant in error, a manifest error has happened to the damage of George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected,

the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this the 26th day of May, 1923.

[Seal]

C. R. McFALL,
Clerk of the United States District Court for the
District of Arizona.

Allowed this the 26th day of May, 1923.

WM. H. SAWTELLE,
United States Judge.

Return on Writ of Error.

The answer of the Judge of the District Court of the United States, for the District of Arizona, to the within writ of error:

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal]

C. R. McFALL,
Clerk U. S. District Court, District of Arizona.

Filed May 26, 1923. C. R. McFall, Clerk United States District Court for the District of Arizona.

Received copy of foregoing writ June 1, 1923,
F. H. BERNARD,
U. S. Attorney.

In the District Court of the United States for the
District of Arizona.

No. C—1872 (TUCSON).

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JEWEL A. BOSTICK,
Defendant;

GEORGE E. JACKSON, Doing Business Under
the Trade Name and Style of SOUTHERN
ARIZONA AUTO COMPANY,
Intervener.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the
United States for the District of Arizona, do here-
by certify that I am the custodian of the records,
papers and files of the United States District Court
for the District of Arizona, including the records,
papers and files in the case of the United States of
America, Plaintiff, vs. Jewel A. Bostick, Defendant,

said case being Number C—1872 (Tucson) on the Docket of said Court.

I further certify that the attached transcript contains a full, true and correct transcript of the proceedings in said case of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appear from the originals of the record and on file in my office as such Clerk, in the city of Tucson, State and District aforesaid.

I further certify that the Clerk's fees for preparing the transcript of this record amount to Twenty-one and 5/100 (\$21.05) Dollars, and that said sum has been paid to me by counsel for intervener, George E. Jackson, doing business under the trade name and style of Southern Arizona Auto Company.

I further certify that the original writ of error and the original Citation issued in this cause are attached hereto.

WITNESS my hand and the seal of said court, this 5th day of June, A. D. 1923.

[Seal] C. R. McFALL,
Clerk of the United States District Court, District
of Arizona.

[Endorsed:] No. 4046. United States Circuit Court of Appeals for the Ninth Circuit. George E. Jackson, Doing Business Under the Trade Name

and Style of Southern Arizona Auto Company,
Plaintiff in Error, vs. The United States of America,
Defendant in Error. Transcript of Record. Upon
Writ of Error to the United States District Court
of the District of Arizona.

Received June 7, 1923.

F. D. MONCKTON,
Clerk.

Filed June 14, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court
of Appeals for the Ninth Circuit

GEORGE E. JACKSON, Doing Business Under the Trade Name and Style of SOUTHERN ARIZONA AUTO COMPANY,

Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 4046

Opening Brief of Plaintiff
in Error

JOSEPH MUSGROVE,
Los Angeles, California,

TOWNSEND, STOCKTON & DRAKE,
Phoenix, Arizona,
Attorneys for Plaintiff in Error.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE E. JACKSON, Doing Busi-
ness Under the Trade Name
and Style of SOUTHERN ARIZONA
AUTO COMPANY,

Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 4046

OPENING BRIEF OF PLAINTIFF IN
ERROR

STATEMENT OF THE CASE

In this proceeding while pending in the lower Court, on October 2nd, 1922, the plaintiff in error filed his petition in intervention consisting of a third party claim to a certain Hudson touring automobile, claiming the automobile as conditional vendor and asking that it or the proceeds thereof, after sale, be turned over to him for the reason that he had no knowledge that the automobile was used or was to be used in the unlawful transportation of liquor. The petition was verified by

intervener and upon the same day it was filed a copy thereof was served upon the Assistant United States Attorney for the District of Arizona, in which the proceeding to confiscate and sell the automobile was pending (T. of R. 23.) On January 4th, 1923, an information was filed against J. A. Bostick, who, as it will presently appear was the conditional vendee of said automobile, the second count of which said information charged that the defendant was guilty of unlawful transportation of liquor in the automobile in question. (T. of R. 2.) This information was the result of a previous arrest of said J. A. Bostick and seizure of said automobile, which was then being used by said defendant for the transportation of intoxicating liquor. (T. of R. 10, 24.) Subsequently said Bostick pleaded guilty to said charge of unlawful transportation of liquor (T. of R. 7) and was fined the sum of \$500.00. (T. of R. 5.) On March 15th, 1923, the verified petition of plaintiff in error by way of third party claim came on for hearing. The United States Attorney appeared for the government and no one appeared for the petitioner. Thereupon the verified petition was submitted and by the Court taken under advisement. (T. of R. 8.) It is a plain inference from the record and is a fact which will not be denied by the United States Attorney that Judge Dooling assumed for the purpose of hearing

and decision that the allegations of plaintiff's verified petition were true. As stated in the record the *petition* was submitted and by the Court taken under advisement. (T. of R. 8.) On April 20th, 1923, Judge Dooling filed a written opinion and order denying the petition of the intervener and requiring a sale of the said automobile in the usual manner. On May 23rd, 1923, Judge Dooling, at the request of plaintiff, added to said opinion and order a notation that "The Court now finds as a fact that plaintiff had no knowledge that the automobile was used or was to be used in the unlawful transportation of liquor." Because it plainly appears from the submission of the verified petition as such to the Court and from the opinion and special finding in connection therewith that the allegations of plaintiff's verified petition were assumed by the Court to be true, we now refer briefly to the facts as alleged in said petition which were deemed insufficient by the Court to constitute a valid basis for relief. (T. of R. 13.)

(Throughout the remainder of this brief we will refer to plaintiff in error as the plaintiff and to defendant in error as the defendant.)

Plaintiff is and was at all times mentioned doing business as a retail automobile dealer

under the trade name of Southern Arizona Auto Company, with his principal place of business in the City of Douglas, State of Arizona. On April 6th, 1922, plaintiff sold the automobile in question, a Hudson touring car, by a conditional sales contract containing the usual provisions (T. of R. 19), to the said Bostick for the sum of \$700.00, of which amount the sum of \$150.00 was paid on the date of the contract. The automobile was delivered to Bostick on the date of the contract and a few days thereafter he was arrested for the unlawful transportation of liquor in said machine. The transportation of intoxicating liquor was done without the knowledge, consent or connivance of plaintiff, or of any employee, servant or agent of plaintiff. After the seizure of the automobile by the authorities Bostick defaulted in his payments and plaintiff elected to re-take possession in accordance with the terms of the contract, and as owner of the legal title to said automobile, offering to pay any just charges for storage and other costs and expenses that might be required of him by the Court.

After denial of plaintiff's third party claim plaintiff filed a petition for a writ of error, (T. of R. 30), and perfected proceedings resulting in issuance of writ of error on May 26th, 1923, by the Honorable Wm.

H. Sawtelle, United States Judge for the District of Arizona. (T. of R. 36.)

ASSIGNMENT OF ERROR

That the Court erred in denying the petition of the intervener, plaintiff herein, and in ordering the automobile involved in these proceedings sold without recognition of any right of plaintiff to a return of the same, or in or to any of the proceeds thereof, notwithstanding the fact that the Court found that the intervener was the conditional vendor of said automobile, and had no knowledge that said automobile was used or was to be used in the unlawful transportation of liquor, (T. of R. 32) and vacated proceedings resulting in issuance of writ of error on May 26th, 1923, by the Honorable William H. Sawtelle, United States Judge for the District of Arizona. (T. of R. 36.)

ARGUMENT

In view of the uncontroverted facts of this case the main question presented is this: Is the interest of a conditional vendor of an automobile subject to forfeiture when the automobile is seized by the government while

the vendee is using the machine for illegal transportation of liquor, notwithstanding the vendor was without notice of any such use or intended use of the automobile? This question is one of great practical importance, especially to the District of Arizona. Large selling agencies of automobiles in that state as well as the Federal authorities have been subjected to uncertainty and confusion by directly conflicting decisions by two different judges in the same District. Irreconcilably opposed to the decision of Judge Dooling, sitting in the place of Judge Sawtelle, at Tucson, in the instant case, is the late decision at Phoenix, rendered April 30th, 1923, by Judge Fred C. Jacobs, newly appointed Federal District Judge for Arizona, who held in the case of U. S. v. Addington, C 1748 in favor of the Eisenhour Bradley Motor Company, as intervener that since petitioner was without notice that the vehicle was being used or was to be used for illegal transportation of liquor the car must be sold and the proceeds of the sale should first be used after payment of costs, to pay the claim of intervener, the balance, if any, to be paid into the treasury of the United States.

Section 26 of the National Prohibition Law provides:

“Whenever intoxicating liquors transported or possessed illegally shall be

seized by an officer he shall take possession of the vehicle and team or automobile * * * and shall arrest any person in charge thereof. The Court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized * * * shall pay all liens, according to their priority, which are established as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor."

Judge Dooling, in his opinion in the lower Court, assumed without discussion that the intervener as conditional vendor is the "owner" of the automobile in question, rather than a "lienor" within the meaning of the Prohibition Act and based his entire opinion on that assumption, denying the petition of intervener accordingly and making no provision for payment of our claim for the unpaid purchase price. In this assumption we believe Judge Dooling to have been entirely in error. We submit that within a fair interpretation of the Act and the obvious purpose to be accomplished, the conditional vendee is to be regarded as the owner and the conditional vendor a lienor.

Words in a statute are not necessarily to be confined to their ordinary meaning. As was forcefully stated by the Circuit Court of Appeals, Second Circuit, in the case of *Scandinavia Belting Co. v. Asbestos, etc., Works of America*, 257 Fed. 937, 954, during the course of an opinion interpreting the word "owner" used in a statute: "It is an established rule governing the construction of statutes that they are to have a rational and sensible interpretation. The object which the legislative body sought to attain and the evil which it endeavored to remedy may always be considered to ascertain its intention, and to interpret its act. *United States v. Ninety Nine Diamonds*, 139 Fed. 961, 72C. C. A. 9, 2 L. R. A. (N. S.) 185. And in *Maxwell on the Interpretation of Statutes* (4th Ed.) p. 101 the rule is laid down that—'Even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to it if fairly susceptible of it.'" In the same opinion the Court quotes (p. 954) with approval the following language from *Carter v. Bolster*, 122 Mo. App. 135, 141, 98, 105, 106: "The word 'property' as well as 'owner' may be used to convey a meaning sometimes broad and sometimes quite restricted."

Doubtless in its commonly accepted sense the word "owner" means only the person who

holds legal title. But in various statutes and different connections the word has been given various meanings. In a long foot note contained in 29 Cyc. 1550 are gathered numerous decisions giving the word "owner" a much broader meaning so as to include among others, equitable owner, lessee, one in possession of a dwelling house under a valid and subsisting contract of purchase, one who has an interest in land for years, for life or any greater estate, freehold, in reversion or remainder, etc. Also in *Lefevre v. Chamberlain*, 228 Mass. 346, 117 N. E. 325 a conditional vendee was held to be the "owner" within the meaning of a statute providing for the registration of automobiles, the opinion citing an earlier decision holding that "owner" included bailees, mortgagees in possession and vendees under conditional contracts of sale who have acquired a special property which confers ownership as between them and the general public for the purpose of registration. The same rule of liberal interpretation as enunciated in the *Scandinavia Belting Co.* case, *supra*, by the Circuit Court of Appeals of the second circuit, applies with equal force to the interpretation of the word "lienor" in the Act in question.

The only decision which we can find with reference to the precise point here in issue involving an interpretation of the provisions of

the Prohibition Act now in question with reference to the right of an innocent conditional vendor is found in the case of *United States v. Sylvester*, 273 Fed. 253. In that decision District Judge Thomas of Connecticut sustained the right of an innocent conditional vendor after seizure of an automobile used in illegal transportation of liquor and held that the claim of such a vendor to the unpaid purchase price should be satisfied out of the proceeds of the sale of the car. The Court in that case concluded that an innocent conditional vendor was a lienor entitled to reimbursement; that the obvious purpose of the act is to punish wrong-doers and to protect the interest of all innocent persons. We refer to the *Sylvester* case as an admirable interpretation of the statute in its various applications.

We submit that so far as the Act in question is concerned the conditional vendee, not the conditional vendor, should be held to be the "owner" of the automobile. It is the vendee who has the substantial dominion over the property and beneficial enjoyment of it subject only to certain restrictions imposed by contract. If he is not the owner no protection whatever is afforded an innocent conditional vendee whose automobile may have been loaned to a friend, rented for a brief period or surreptitiously taken by a wrong-doer for illegal transportation of liquor. Sure-

ly the vendee is the owner in all conditional sales and it is he instead of the vendor who is entitled to show "reasonable cause to the contrary" and thus prevent the sale of the car and procure its return to himself. Otherwise an innocent conditional vendee is utterly without protection and no court has even any discretion to afford him relief no matter how nearly he may have paid for the automobile. The return of the car to such an innocent vendee would not forfeit the interest of any other person nor deprive the Government of any proceeds to which it might be entitled. On the other hand, we submit that the conditional vendor is a "lienor" within the fair intentment of the statute. He has no possession, no beneficial enjoyment, no control of the use of the car in the hands of third persons. His only interest is very little more than that of a mortgagee. In referring, at the conclusion of his opinion, to the exercise of his supposed discretion against a conditional vendor on the ground of the presumed harshness of any conditional sales contract with its forfeiture clause, Judge Dooling overlooked the fact that in the State of Arizona as in several other states the "Uniform Conditional Sales Law" has been adopted. Arizona Session Laws 1919, Chap. 40 (Senate Bill No. 64). In this act which safeguards the interests of the vendee are various paragraphs relating to the following topics: "Notice of intention to re-

take"; "Redemption"; "Compulsory resale by seller"; "Resale at option of parties"; "Proceeds of Resale". In Arizona and several other states which have adopted this law entitled "An Act Concerning Conditional Sales and to make Uniform the Law relating thereto", the conditional sales contract has been made even more than ever before to approximate a chattel mortgage. To hold that a conditional vendor has the same rights as a chattel mortgagee or any lienor within the provisions of the Act would accomplish the obvious purpose of Congress, that is to penalize the guilty and protect the innocent. At the same time the Government would not lose by such an interpretation. If the conditional vendor be held to be the "owner" his only redress is to "show cause to the contrary", and procure a return of the car, in which event the interest of the wrong-doing vendee would be forfeited to the vendor instead of to the Government, a serious objection pointed out by Judge Dooling in his opinion. On the other hand, if the vendor be held to amount to a "lienor" he has no right to a return of the car at the expense of the Government, but is paid the amount of the outstanding purchase price and the balance of the proceeds, if any, is paid in to the United States Treasury.

If our foregoing argument is sound the intervener was clearly entitled as an innocent

lienor to protection under the express terms of the Act. The original prayer of the Petition in Intervention was for the return of the automobile, or for such other relief as was just and adequate in the premises. Attention is called to the fact that upon the face of the Petition in Intervention it appears that the only equity of the conditional vendee, Jewel A. Bostick, resulted from a single initial payment of only One Hundred Fifty (\$150.00) Dollars on an agreed purchase price of Seven Hundred Dollars for a used automobile. In fact depreciation has absorbed the entire initial payment to say nothing of the costs. Therefore we requested the return of the automobile upon the payment of costs. Instead of entering an order (T. of R. 29), denying the Petition of the Intervener and directing that the automobile be sold "in the usual way" we contend that error was committed in failing to direct the return of the car to Intervener after the payment of the costs to the Government or in lieu thereof failing to make provisions for the payment of the remainder of the purchase price to the Intervener out of the proceeds of the sale after the payment of costs. Because of this error we submit that the order of sale should be vacated and the automobile ordered returned to the Intervener upon payment of the costs but if this relief be not granted we urge that the order of sale be

modified so as to direct payment of the unpaid purchase price to Intervener after the payment of costs and the balance, if any, be forfeited to the Government.

Respectfully submitted,

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Phoenix, Arizona,
Attorneys for Plaintiff in Error.

United States
Circuit Court
of Appeals for the Ninth Circuit

George E. Jackson, Doing Business Under the Trade Name and Style of Southern Arizona Auto Company,

Plaintiff in Error,
vs.

The United States of America,
Defendant in Error.

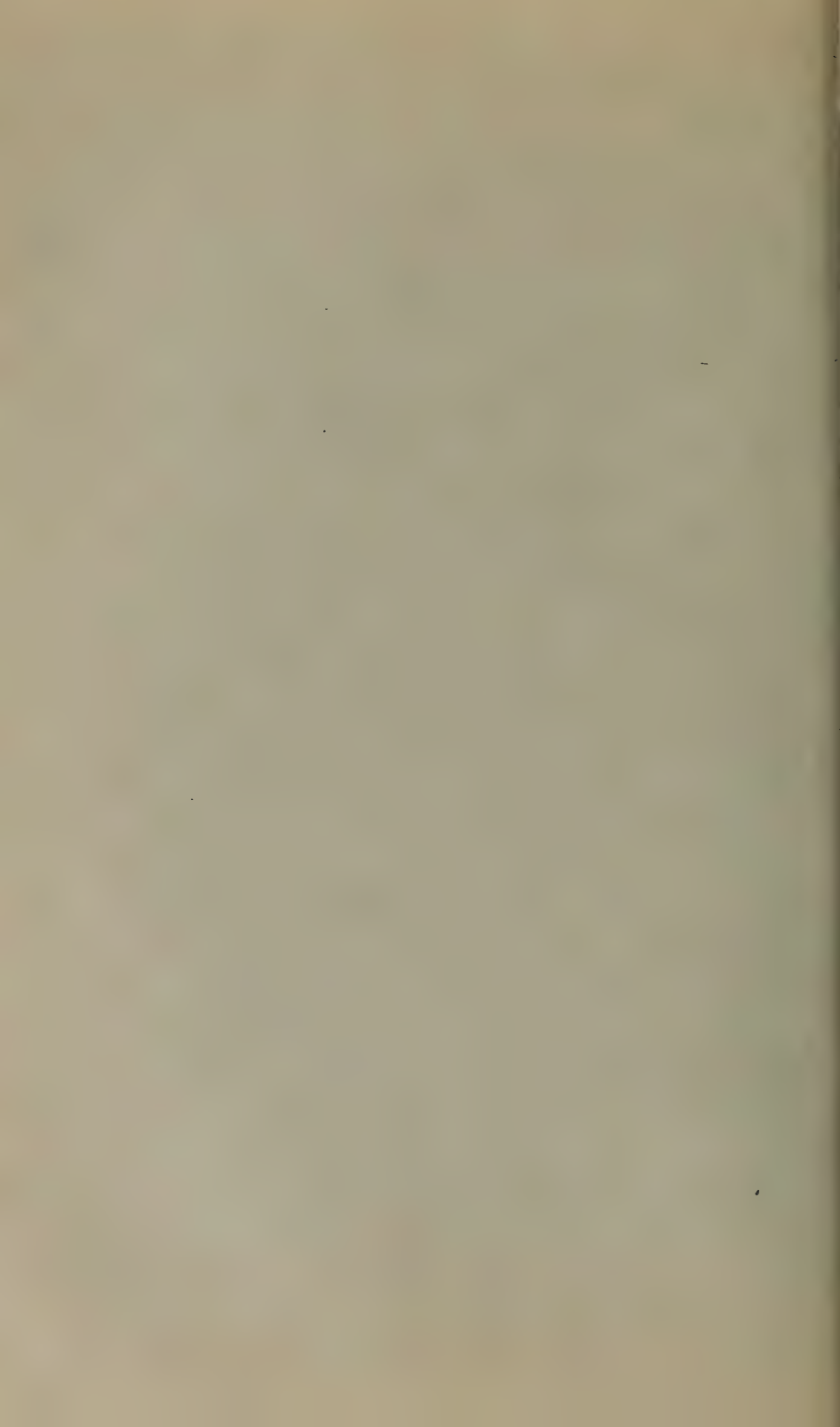
No. 4046

Brief of Defendant in Error

FREDERICK H. BERNARD,

United States Attorney

Attorney for Defendant in Error.



UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

George E. Jackson, Doing Business Under the Trade Name and Style of Southern Arizona Auto Company,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

No. 4046

BRIEF OF DEFENDANT IN ERROR

The Plaintiff in Error herein assigns as error the denial by the Trial Court of his petition in intervention, asking for the return to him of an automobile sold by him under a conditional sales contract, and seized by Federal Officers while being used by his conditional vendee in the illegal transportation of liquor, and the refusal of the Court to direct the payment of the unpaid purchase price of said automobile to him from the proceeds of the sale thereof.

The trial court found as a fact that the claimant below, plaintiff in error here, had no knowledge that the automobile in question was

used or to be used in the unlawful transportation of liquor, and although the plaintiff in error now asks that the order of sale herein be vacated, and the automobile returned to him, it is apparent from his brief that he has abandoned his claim as "owner" of the automobile in question, and now relies upon his claim as a "lienor" under the provisions of Section 26 of the National Prohibition Act. However, in as much as the question as to whether a conditional vendor of an automobile is the owner thereof, or merely a lienor, is directly involved in this case, it is necessary to ascertain the exact status of the conditional vendor in order to determine the relief to which he is entitled, if any.

Counsel for plaintiff in error first points out that the recent decision of the Honorable Fred G. Jacobs, rendered at Phoenix, Arizona, is irreconcilably opposed to the recent decision of Judge Dooling in the present case, and in the Montgomery case, all decided in the District of Arizona, and involving practically the same questions.

For the purposes of this case, it will be admitted that these opposite views have been expressed in this district, Judge Jacobs following the decision of Judge Thomas in the case of the United States vs. Sylvester, 273 Federal, 256. This Court is, therefore, confronted with the question of whether a conditional vendor of an

automobile, seized while being used by the conditional vendee in the illegal transportation of liquor is entitled to the proceeds of the sale of such automobile, or so much thereof as may be necessary to satisfy the unpaid purchase price of such automobile, after payment of all costs, or briefly, whether the conditional vendor of an automobile, without knowledge that the automobile was used or was to be used in the unlawful transportation of liquor, or is a bona fide "lienor" or an "owner" within the meaning of Section 26 of the National Prohibition Act.

Counsel for the plaintiff in error asserts that "the lower Court assumed, without discussion, that the intervenor, as conditional vendor, is the owner of the automobile in question, rather than the lienor, within the meaning of the Prohibition Act, and bases his entire opinion on that assumption." It is respectfully pointed out that the lower Court not only did not assume that the conditional vendor was the owner of the automobile in question, but held directly that such conditional vendor was the owner within the meaning of Section 26 of the National Prohibition Act, not the lienor. Quoting from Judge Dooling's opinion in the case at bar (T. of R., page 28) "In either view, I adhere to the decision in the Montgomery case:

1. Because I believe that the statute requires more of the owner than of the lienor, and

2. If the Court has the discretion, I believe it should be exercised against those who deliver the absolute and unrestricted possession to another upon conditional sale, while retaining title so as to avoid foreclosures, and enable them without going into court to forfeit all payments already made to them."

Also, in the case of the United States vs. Montgomery, 289 Federal, 125, is found the following: "It is not unreasonable to suppose that Congress had in mind the fact that the owner may determine who shall have the use of the vehicle, and thus, in a measure, control such use, while a lienor may not because he is at no time entitled to its possession."

The lower Court, therefore, having distinctly held that such conditional vendor was the owner of the automobile, found from all the facts before it that "good cause" was not shown by the vendor, and denied his petition for a return of the automobile. The question as to what constitutes "good cause" is one which addresses itself solely to the sound discretion of the trial judge, and is ably discussed by Judge Dooling in his opinion in this case. (T. of R., pages 26-27). Manifestly, plaintiff in error cannot, as he has done throughout his brief, adhere to his position as owner and yet claim he has a lien on the automobile for unpaid purchase price. Neither can he assume the position of a lienor and demand

that the car be returned to him in specie, after payment of storage charges, and the lower Court in reaching its conclusion in the case at bar, was necessarily required and obliged to pass upon the question whether a conditional vendor was a "lienor" or "owner" within the meaning of the Prohibition Act before reaching its conclusion.

Counsel for plaintiff in error further contends that "so far as the Act in question is concerned, the conditional vendee, not the conditional vendor, should be held to be the owner of the automobile." (Plf. in Error Brief page 10.) And cites several instances wherein a conditional vendee or mortgagee in possession have been construed to be the owner within the particular statute or regulation under consideration, and although in such instances, the broad meaning has been given to the word "owner," under the statute of Arizona, "all words and phrases shall be construed and understood according to the common and approved usage of the language." R. S. Arizona, 1913, Par. 5552, and no such construction as contended for by plaintiff in error can be placed upon the word "owner" with reference to a conditional vendee, where, as in the case at bar, a conditional vendor has purposely and absolutely retained title to the property in himself, and, to a large extent, exercised control over the property, by requiring the vendee to insure such property for the protection of

the vendor; by prohibiting the vendee from removing the property from Arizona without the vendor's consent, and by the vendor's reserving the option of immediately repossessing himself of the automobile in the event of default by the vendee, and the forfeiture of all payments made by the latter. That the broad construction contended for by the plaintiff in error is not applicable in cases of conditional sales contracts is apparent from the very nature of the contract itself, whereby the seller retains, not a lien, but the full title. "It is a distinguishing feature of the so-called conditional sale that the title to or property in the goods remains in the seller until payment of the price. The security retained by the seller is not a lien, but a reservation of title and the right to pursue the property in specie." 35 Cyc. 652-653.

The view above expressed has been followed in the case of McArthur Brothers Mercantile Company, a corporation, vs. Francisco Hagihara, 22 Arizona, 100, wherein the Supreme Court of Arizona held that the contract for the sale of an automobile under terms and conditions similar to those in the case at bar, was a "conditional sale" and not an "absolute sale" with a mortgage back as security. In view of the decision in the above case, a conditional vendor has no lien upon property which is the subject of a conditional sales contract in Arizona. The McArthur

case arose upon a conditional sales contract executed prior to the passage of the "Uniform Conditional Sales Act" in Arizona, but was decided about two years after its passage, and the decision still stands as determinative of the status of the vendor and vendee under a conditional sales contract. The "Uniform Conditional Sales Act" of Arizona became effective prior to the execution of the contract referred to in the case at bar, and although the Act affords greater protection to the vendee under such contract by allowing, under certain conditions, a period of redemption after default, and requires the vendor to give certain notice to the vendee before sale, where the vendee has paid five hundred dollars or more of the purchase price, it in no way affects the validity or rulings laid down in the McArthur case.

It is further contended by counsel for the plaintiff in error that "to hold that a conditional vendor has the same rights as a chattel mortgagee or any lienor within the provisions of the Act would accomplish the obvious purpose of Congress, that is to penalize the guilty and protect the innocent. At the same time, the Government would not lose by such an interpretation." While it may be said that the obvious purpose of Congress in the enactment of Section 26 of the Prohibition Act was to punish the wrong-doer and protect the interests of innocent

persons, it is equally apparent that Congress recognized that an automobile or other vehicle might be used in violation of the Act, and that guilt may attach to an automobile or other vehicle itself by reason of its illegal use, regardless of the innocence of its owner. This is evident from the provision that if no claimant to the vehicle is found, it is in effect, condemned and sold by the officer who made the seizure. The mere fact that the owner is free from complicity in the offense will not relieve the vehicle from forfeiture and the burden is placed upon the owner to show "good cause" why the vehicle should not be forfeited. Such owner, because of the control which he has or retains over the vehicle, must, of necessity be held to a greater accountability than one claiming the proceeds of sale of a forfeited vehicle as a bona fide lienor. The very apparent effect of the interpretation contended for by plaintiff in error would be to constitute the various branches of the Department of Justice and other departments, to wit, the Court, District Attorney's office and Marshal, as well as the Prohibition Department, an agency for the sale of an automobile sold under a conditional sales contract and seized while being used in violation of the Prohibition Act. Rarely, if ever, will an automobile seized and sold at public auction for illegal transportation of liquor bring sufficient to pay all costs incurred by the Government and the balance due for purchase price,

with the result that the Government is put to a great expense in order to satisfy the demands of the conditional vendor. The reason, therefore, for a strict construction of the term "owner" becomes obvious, as well as the necessity of allowing a wide discretion to the trial court in determining whether or not "good cause" is shown, and it is reasonable to suppose that Congress had this situation in mind when it enacted Section 26 of the Act, and drew the close distinction, which is most apparent, between the rights and remedies of an "owner" and a "lienor." The determination of the question herein involved necessarily, in cases of conditional sales contracts, involves the determination of the question as to who is the owner of the automobile, and where, as in the case at bar, the vendor purposely and unequivocally retains title so as to protect and establish his ownership in the automobile, he cannot by any strained construction of the Act, after the automobile is seized, substantiate his claim that he is only the lienor. As pointed out by Judge Dooling in his opinion (T. of R., page 28) "So that the owner on conditional sale would have the machine returned to him, no matter how much had been paid thereon, or how little is due, and the interest of the defendant in the machine would thus be forfeited to the seller instead of th Government." A conditional sales vendor is entitled to no more consideration than a mortgagee, and if he, in his dealings with the

purchaser instead of transferring title and taking a lien back chooses to surround himself with the protection and rights of ownership of an automobile, and thereby, to a considerable extent, control its use, he and not the Government must suffer the consequences of its illegal use. Any other interpretation of the Act would defeat the avowed intention and purpose of Congress to effectively put an end of the traffic in intoxicating liquors.

It is respectfully submitted that the cases above cited, as well as the recent decisions of the District Courts in California, particularly the decision of the Honorable John S. Partridge rendered on April 14th, 1923, in the case of Daniel Belli against the United States, number 12871, Southern Division of the United States District Court for the Northern District of California, First Division, are determinative and conclusive of all questions raised by the plaintiff in error in the case at bar, and that the order appealed from should be affirmed.

Respectfully submitted,
FREDERICK H. BERNARD,
Attorney for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEROY POWERS, Otherwise Known as ROY
POWERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Eastern District of Washington, Northern Division.

FILED

1913

U. S. DISTRICT COURT

United States
Circuit Court of Appeals

For the Ninth Circuit.

LEROY POWERS, Otherwise Known as ROY
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vs.

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Attorneys for Defendant Leroy Powers, Plaintiff in Error. [2*]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER, J. GUY DUNGAN, JESSE B. COOKE, *alias* DICK COOKE, R. F. CARPENTER, LEROY POWERS and JOHN WOODS,

Defendants.

*Page-number appearing at foot of page of original certified Transcript of Record.

Indictment.**COUNT I.**

The Grand Jurors of the United States, chosen, selected and sworn in and for the Northern Division of the Eastern District of Washington, upon their oaths present:

That heretofore, to wit: on or about the first day of May, 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Parker, J. Guy Dungan, Jesse B. Cooke, *alias* Dick Cook, R. F. Carpenter, LeRoy Powers and John Woods, whose other or true names are to the Grand Jurors unknown, defendants herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown, to commit the acts made offenses and crimes by the laws of the United States, to wit: the Act of Congress of October 28, 1919, known as the National Prohibition Act; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown (all of the said individuals, including the said [3] defendants and the said divers other persons, being hereinafter in this indictment called "conspirators," and who are intended and referred to wher-

ever the word conspirators may hereafter appear); to devise and execute a scheme whereby they, the said conspirators, working in conjunction with each other would procure and cause to be procured for their intended use intoxicating liquors of various varieties for the purpose of possessing the same for beverage purposes, as they the said conspirators might deem fit and proper with the intention of selling, bartering, exchanging, giving away and furnishing; that is, the said conspirators conspired and agreed together to possess intoxicating liquors containing more than one-half of one per centum of alcohol by volume and the same being then and there fit for beverage purposes, within the State and Eastern District of Washington, without they or any one of them having first obtained a permit to so possess intoxicating liquors, as is required by law to be obtained.

And the Grand Jurors aforesaid do further present and find:

That the said conspirators did on or about the 27th day of July, 1922, at Republic, Ferry County, in the Eastern District of Washington, and within the jurisdiction of this court, renew and continue the said conspiracy, and that in pursuance of the said unlawful and felonious conspiracy, combination, confederation and agreement, it was furthermore a part of the said conspiracy that they would assist others who might be engaged in the illegal possession of intoxicating liquor, in violation of the National Prohibition Act, and that they would provide a safe place for the temporary storing, keeping and

concealment of intoxicating liquors that was owned and possessed by themselves or other persons to the Grand Jurors unknown. [4]

And the Grand Jurors aforesaid do further find and present:

That the aforesaid wilful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the first day of May, 1921, in Ferry County within the State and Eastern District of Washington (the exact place being to the Grand Jurors unknown), and that it was furthermore a part of the said scheme that the conspiracy was to be a continuing one, and it was continued in existence, operation and execution from about the first day of May, 1921, until the seventh day of August, 1922, and that at all times between the said dates the said defendants and the divers persons to the Grand Jurors unknown, did continue to wilfully, unlawfully and feloniously conspire, confederate and agree together to commit the acts hereinafter set forth in detail.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That in pursuance to the said unlawful and felonious conspiracy, combination and agreement and to effect the object of the same the said conspirators did wilfully and unlawfully perform and do the following acts:

I.

That on or about the 26th day of July, 1922, in Republic, Ferry County, in the State and Eastern District of Washington, and within the jurisdiction

of this court, the said conspirators did wilfully and unlawfully keep and conceal about twenty (20) cases of intoxicating liquor, the exact amount of which is to the Grand Jurors unknown, said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes, said intoxicating liquor being the property of certain persons named Joseph H. Frankel and Henry Dapper. [5]

II.

That on or about the 27th day of July, 1922, at Republic, Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully steal from Joseph H. Frankel and Henry Dapper about twenty (20) cases of intoxicating liquor (the exact amount of which is to the Grand Jurors unknown) said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

III.

That on or about the 27th day of July, 1922, at Republic, Ferry County, in the State and Eastern District of Washington and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully possess about twenty (20) cases of intoxicating liquor (the exact amount of which is to the Grand Jurors unknown), said intoxicating liquor then and there containing more than one-half of one

per centum of alcohol by volume and then and there being fit for beverage purposes.

Contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States.

COUNT II.

And the Grand Jurors aforesaid, upon their oaths aforesaid do further present:

That heretofore, to wit: on or about the 1st day of May, 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke, *alias* Dick Cooke, R. F. Carpenter, Leroy Powers and [6] John Woods, whose other or true names are to the Grand Jurors unknown, defendants herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown to commit the acts made offenses and crimes by the laws of the United States, to wit: the Act of Congress of October 28, 1919, known as the National Prohibition Act; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown (all of the said individuals, including the said defendants and the said divers other persons, being hereafter in this indictment called "conspirators," and who are intended and referred to whenever the word conspirators may hereafter appear),

that they, the said conspirators, working in conjunction with each other would aid, abet and counsel certain persons who were engaged in the unlawful possession and transportation of liquor from the Dominion of Canada into the United States of America, and particularly in Ferry County in the Eastern District of Washington and within the jurisdiction of this court; it was a part of the said unlawful and felonious conspiracy so entered into by the said conspirators that they would become acquainted with persons engaged in the unlawful liquor traffic and commonly known as or termed "bootleggers" and offer to aid and assist them and guarantee them protection while in transit through the said County of Ferry, in the State of Washington; that they, the said conspirators would furnish automobiles to transport the liquor from a point near the American line to and into the Town of Republic, and that some of the said conspirators would accompany the person or persons engaged in the bootlegging business so as to afford [7] them proper security and protection in their unlawful business; that they would collect from the various bootleggers sums of money for such service as they would render in assisting them in the actual transportation of intoxicating liquor within the State and Eastern District of Washington without they or any one of them having first obtained a permit to transport intoxicating liquors, as is required by law to be obtained.

And the Grand Jurors do further find and present:

That the said conspirators did on or about the 22d day of May, 1922, in Ferry County, in the Eastern District of Washington, and within the jurisdiction of this court, renew and continue the said conspiracy and that in pursuance of the said unlawful and felonious conspiracy, combination, confederation and agreement it was furthermore a part of the said conspiracy that they would assist, aid and abet certain persons engaged in the illegal transportation of intoxicating liquors, containing more than one-half of one per centum of alcohol by volume, being then and there fit for beverage purposes, in violation of the National Prohibition Act.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and say:

That the aforesaid willful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the first day of May, 1921, in Ferry County within the State and Eastern District of Washington (the exact time being to the Grand Jurors unknown); that it was a part of the said scheme that the said conspiracy was to be a continuing one and it was continued in existence, operation and execution from about the first day of May, 1921, until the seventh day of August, 1922, and that at all times between the said dates the said defendants and the divers other persons to the Grand Jurors unknown, did continue to wilfully, [8] unlawfully and feloniously conspire, combine, confederate and agree together to commit the acts hereinafter set forth in detail.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That in pursuance of the said unlawful and felonious conspiracy, combination and agreement and to effect the object of the same, that on or about the dates hereinafter designated, in Ferry County, within the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully perform and do the following acts:

I.

That on or about the 24th day of May, 1922, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did willfully assist, aid and abet in the transportation of about ten (10) cases of intoxicating liquor, the exact amount of which is to the Grand Jurors unknown, from a point near the Canadian line in Ferry County to and into the Town of Republic, the said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

II.

That on or about the 10th day of July, 1922, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully assist, aid and abet in the transportation of about fifteen (15) cases of whisky, the exact amount of which is to the Grand Jurors unknown, from a point near the Canadian line, in Ferry County, to

and into the Town [9] of Republic, the said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

III.

That on or about the 28th day of July, 1922, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this Court, the said conspirators did willfully and unlawfully assist, aid and abet in the transportation of about (20) cases of whisky, the exact amount of which is to the Grand Jurors unknown, from a point near the Canadian line in Ferry County to and into the Town of Republic, the said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT III.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: on or about the 1st day of May, 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke, *alias* Dick Cooke, R. F. Carpenter, Leroy Powers and John Woods, whose other or true names are to the Grand Jurors unknown, defendants

herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown to commit the acts made offenses and crimes by the laws of the United States, to wit: the Act of Congress of March 3, 1917, [10] (39 Stats. 1069), known as the Reed "Bone Dry" Amendment; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown (all of the said individuals, including the said defendants and the said divers other persons, being hereafter in this indictment called "conspirators," and who are intended and referred to wherever the word conspirators may hereafter appear), that they, the said conspirators, working in conjunction with each other, did aid, abet and counsel certain persons who were engaged in the unlawful transportation of liquor from the State of Washington into other states, and particularly into the city of Portland, in the State of Oregon; it is furthermore a part of the said unlawful and felonious conspiracy, so entered into by the said conspirators, that they would become acquainted with persons who were engaged in the unlawful transportation of intoxicating liquor and in pursuance of the said unlawful conspiracy that they, the said conspirators, would aid and assist them in the transporting and in causing to be transported in interstate commerce quantities of intoxicating liquor from the town of Republic, in Ferry County, in the State and Eastern District of Washington and

within the jurisdiction of this court, to and into the city of Portland, in the State and District of Oregon, via the Great Northern Railway Company and connecting railways, the said Great Northern Railway Company and the said connecting railways then and there being engaged in interstate commerce by lines of railway in the States of Washington and Oregon, and the laws of the State of Oregon prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and the said intoxicating liquor not being transported, as aforesaid, for [11] scientific, sacramental, medicinal and mechanical purposes, and the Grand Jurors do further find and present that the said conspirators did on or about the 25th day of May, 1922, at Republic, in Ferry County, in the State of Washington, and within the jurisdiction of this court, renew and continue the said conspiracy, and that the aforesaid wilful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the first day of May, 1921, in Ferry County, within the State and Eastern District of Washington (the exact time being to the Grand Jurors unknown); that it was a part of the said scheme that the said conspiracy was to be a continuing one and it was continued in existence, operation and execution from about the first day of May, 1921, until the 7th day of August, 1922, and that at all times between the said dates the said defendants and the divers other persons to the Grand Jurors unknown, did continue to wilfully, unlawfully and feloniously conspire, combine, confed-

erate and agree together to commit the acts hereinafter set forth in detail, and that in pursuance of the said unlawful and felonious conspiracy, combination and agreement and to effect the object of the same, the said conspirators did wilfully and unlawfully perform and do the following act:

That on or about the 25th day of May, 1922, at Republic, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully assist, aid and abet Joseph H. Frankel in transporting and causing to be transported in interstate commerce a quantity of intoxicating liquor, to wit: about ten (10) cases of Canadian whiskey to and into the city of Portland, in the State and District of Oregon via the Great Northern Railway Company and connecting railways, [12] said Great Northern and the said connecting railways then and there being engaged in interstate commerce by line of railway in the States of Washington and Oregon, and the laws of the State of Oregon, prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and said intoxicating liquor not being transported, as aforesaid, for scientific, sacramental, medicinal and mechanical purposes, but was then and there fit for beverage purposes and contained more than one-half of one per centum of alcohol by volume, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT IV.

And the Grand Jurors aforesaid, upon their oaths

aforesaid, do further present:

That heretofore, to wit: on or about the 1st day of May 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke, *alias* Dick Cooke, R. F. Carpenter, Leroy Powers and John Woods, whose other or true names are to the Grand Jurors unknown, defendants herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown to commit the acts made offenses and crimes by the laws of the United States, to wit: the Act of Congress of March 3, 1917 (39 Stats. 1069), known as the "Bone Dry" Amendment; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown (all of the said individuals, including the said defendants and the said divers other persons, being hereafter in [13] this indictment called "conspirators," and who are intended and referred to wherever the word conspirators may hereafter appear), that they, the said conspirators, working in conjunction with each other, did aid, abet and counsel certain persons who were engaged in the unlawful transportation of liquor from the State of Washington into other states, and particularly into the town of Pocatello, in the State of Idaho; it is furthermore a part of the said unlawful and felonious

conspiracy, so entered into by the said conspirators, that they would become acquainted with persons who were engaged in the unlawful transportation of intoxicating liquor and in pursuance of the said unlawful conspiracy that they, the said conspirators, would aid and assist them in the transporting and in causing to be transported in interstate commerce quantities of intoxicating liquor from the town of Republic, in Ferry County, in the State and Eastern District of Washington; and within the jurisdiction of this court, to and into the town of Pocatello, in the State and District of Idaho, via the Great Northern Railway Company and connecting railways, the said Great Northern Railway Company and the said connecting railways then and there being engaged in interstate commerce by lines of railway in the States of Washington and Idaho, and the laws of the State of Idaho prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and the said intoxicating liquor not being transported, as aforesaid, for scientific, sacramental, medicinal and mechanical purposes, and the Grand Jurors do further find and present that the said conspirators did on or about the 10th day of July, 1922, at Republic, in Ferry County, in the State of Washington, and within the jurisdiction of this Court, renew and continue the said conspiracy, and that the aforesaid wilful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the [14] first day of May, 1921, in Ferry County, within the State and

Eastern District of Washington (the exact time being to the Grand Jurors unknown); that it was a part of the said scheme that the said conspiracy was to be a continuing one and it was continued in existence, operation and execution from about the first day of May, 1921, until the seventh day of August, 1922, and that at all times between the said dates the said defendants and the divers other persons to the Grand Jurors unknown, did continue to wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the acts hereinafter set forth in detail, and that in pursuance of the said unlawful and felonious conspiracy, combination and agreement and to effect the object of the same, the said conspirators did wilfully and unlawfully perform and do the following act:

That on or about the 10th day of July, 1922, at Republic in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully assist, aid and abet Joseph H. Frankel and Henry Dapper in transporting and causing to be transported in interstate commerce a quantity of intoxicating liquor, to wit: about fifteen (15) cases of Canadian whisky to and into the town of Pocatello, in the State and District of Idaho, via the Great Northern Railway Company and connecting railways, said Great Northern and the said connecting railways then and there being engaged in interstate commerce by line of railway in the States of Washington and Idaho, and the laws of the

State of Idaho prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and said intoxicating liquor not being transported, as aforesaid, for scientific, sacramental, medicinal and [15] mechanical purposes, but was then and there fit for beverage purposes and contained more than one-half of one per centum of alcohol by volume, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

FRANK R. JEFFREY,
United States Attorney.

Presented to the Court by the foreman of the Grand Jury, in open court, in the presence of the Grand Jury and filed in the United States District Court, August 29, 1922.

ALAN G. PAINE,
Clerk. [16]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER, J.
GUY DUNGAN, JESSE B. COOKE, R. F.
CARPENTER, LEROY POWERS and
JOHN WOODS,

Defendants.

Verdict.

We, the jury in the above-entitled cause, find Thomas Barker? Guilty, J. Guy Dungan? Guilty, Jesse B. Cooke, Not Guilty, LeRoy Powers, Not Guilty, John Woods, Not Guilty as to first Count; Thomas Barker? Guilty, J. Guy Dungan, Not Guilty, Jesse B. Cooke, Guilty, LeRoy Powers, Guilty, John Woods, Not Guilty as to Second Count; Thomas Barker? Guilty, J. Guy Dungan, Not Guilty, Jesse B. Cooke, Not Guilty, LeRoy Powers, Not Guilty, John Woods, Not Guilty as to Third Count; Thomas Barker? Guilty, J. Guy Dungan, Not Guilty, Jesse B. Cooke, Not Guilty, LeRoy Powers Not Guilty, John Woods Not Guilty as to Fourth Count as charged in the Indictment.

T. W. SYMONS, Jr.,

Foreman.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 17, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [17]

United States District Court, Eastern District of Washington, Southern Division,

No. 4110.

Minutes of Judge's Notes.**PLAINTIFF:**

UNITED STATES OF AMERICA.

DEFENDANT:

CLINE LEDGERWOOD, THOMAS BARKER, J. GUY DUNGAN, JESSE B. COOKE, *alias* DICK COOKE, R. F. CARPENTER, LE-ROY POWERS and JOHN WOODS.

ATTORNEY FOR PLAINTIFF:

U. S. Attorney.

ATTORNEY FOR DEFENDANT:

F. C. Robertson,

E. B. Donley.

Nature of Action: Vio. Sec. 37 Penal Code. Conspiracy to violate National Prohibition Act.

JUDGE'S NOTES:

1922

Aug. 29. A true bill; order to issue bench warrant.

Sept. 2. Defendant Woods arraigned; plea "Not Guilty."

Nov. 13. Defendants arraigned; pleas "Not Guilty," jury empaneled and sworn; testimony taken Nov. 13, 14, 15, and 16; cause submitted, Verdict: Woods, not guilty, defendant discharged and bond exonerated. Powers and Cooke, guilty as to 2d count, not guilty as to 1st and 3d and 4th, Dungan, disagreed on 1st count, not guilty as to 2d, 3d and 4th, Jury unable to agree on all counts as to defendant Barker.

1923.

Jan. 4. Sentence, Powers; 1 year and 1 day, U. S. Pen. at McNeil Island, and \$2,000.00

Jan. 4. fine; Sentence: Cooke, 1 year and 1 day, U. S. Pen. at McNeil Island.

Mar. 17. Defendant Ledgerwood arraigned; Plea "Not Guilty." [18]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER, J.
GUY DUNGAN, JESSE B. COOKE, *alias*
DICK COOKE, R. F. CARPENTER, LEROY
POSERS and JOHN WOODS,

Defendants.

**Motion for Order Setting Aside and Quashing
Indictment.**

Come now the defendants, Thomas Barker, J. Guy Dungan, Jesse B. Cooke, Leroy Powers, and move the Court for an order setting aside and quashing the indictment heretofore returned and filed herein, upon the ground and for the reason that said indictment alleges separate, distinct, and specific offenses, alleges numerous, disconnected, separate, and distinct offenses and transactions specifically in counts 3 and 4 of said indictment.

In the event that the Court should deny this motion then the defendants move the Court for an order requiring plaintiff to elect as to whether the Government shall proceed to trial upon the counts

1 and 2 of said indictment or upon counts 3 and 4 of said indictment.

J. J. LAVIN,
L. B. DONLEY,

Attorneys for Defendants.

Service of the within by receipt of true copy thereof, is hereby accepted at Spokane, Washington, this 13th day of November, 1922.

Attorney for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 13, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [19]

Journal Entries.

In the District Court of the United States for the Eastern District of Washington, Northern Division. September, 1922, Term—51st day—Monday, November 13, 1922.

Court met pursuant to adjournment at 10 A. M.
Present: Honorable FRANK H. RUDKIN, Judge,
Frank R. Jeffrey, U. S. District Attorney, A. F. Kees, U. S. Marshal, C. H. Cummings and C. W. Gray, Bailiffs, D. L. Hyatt, Crier, and Alan G. Paine, Clerk.

PROCEEDINGS:

* * * * *

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD et al.,

Defendants.

Order Denying Motion for Order Setting Aside and Quashing Indictment.

Now on this day the above-entitled cause came on regularly for trial, and counsel having argued the motion to quash and to require the plaintiff to elect as to whether the Government shall proceed to trial upon the counts 1 and 2 or 3 and 4 of said indictment, heretofore filed in the above-entitled cause, and the Court being fully advised in the premises,—

It is hereby ORDERED that said motion be and the same is hereby denied.

* * * * *

Thereupon Court adjourned unto 9:30 A. M. tomorrow.

FRANK H. RUDKIN,
Judge. [20]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER, J.
GUY DUNGAN, JESSE B. COOKE, *alias*
DICK COOKE, R. F. CARPENTER, LEROY
POWERS and JOHN WOODS,

Defendants.

**Motion for Judgment of Acquittal, Notwithstanding
Verdict of Jury.**

Come now the defendants, Leroy Powers and Dick Cooke, and upon the records, files, and proceedings herein, and upon the verdict of the jury, rendered at the trial, moves the Court for judgment of acquittal, notwithstanding the verdict of the jury, upon the ground and for the reason:

I.

That defendants were guilty of the second count of the indictment and that each of the said defendants were not guilty of the other counts of said indictment and that the finding of the jury of "not guilty" of the defendants, and each of them, of the second count of said indictment is equivalent to finding said defendants, and each of them, not guilty of the second count of said indictment, and that the verdict of the jury is therefore inconsistent.

JOSEPH J. LAVIN,

L. B. DONLEY,

Attorneys for LeRoy Powers and Dick Cooke.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 21, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [21]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER, J.
GUY DUNGAN, JESSE B. COOKE, *alias*
DICK COOKE, R. F. CARPENTER, LEROY
POWERS and JOHN WOODS,

Defendants.

Motion in Arrest of Judgment.

Come now the defendants, Leroy Powers and
Dick Cooke, and move the Court in arrest of judg-
ment upon the verdict of the jury herein as to
said defendants, and each of them, upon the ground
and for the reason that the verdict of the jury
finding defendants, herein named, and each of
them, guilty of second count of said indictment and
not guilty of the other counts of said indictment, is
not justified by the evidence, and that the action
of the jury in this regard was and is inconsistent.

JOSEPH J. LAVIN,

L. B. DONLEY,

Attorneys for Defendants.

Filed in the U. S. District Court, Eastern District
of Washington. Nov. 21, 1922. Alan G. Paine,
Clerk. A. P. Rumburg, Deputy. [22]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER, J.
GUY DUNGAN, JESSE B. COOKE, *alias*
DICK COOKE, R. F. CARPENTER, LEROY
POWERS and JOHN WOODS.

Defendants.

Motion for New Trial.

Come now the defendants, Leroy Powers and Dick Cooke, and move the Court for an order setting aside and vacating the verdict of the jury heretofore rendered herein (in the event that the Court shall deny the motion in arrest of judgment and motion for judgment notwithstanding verdict, heretofore served and filed herein) and to grant a new trial to defendants, and each of them, upon the second count of the indictment in said cause, upon the following ground, to wit:

I.

Irregularity in the proceedings of the Court and jury, and adverse party, and orders of this Court, abuse of discretion, by which defendants were prevented from having a fair trial.

II.

Misconduct of the jury.

III.

Accident and surprise, which ordinary prudence could not have guarded against.

IV.

Newly discovered evidence, material for the defendants, which they could not with a reasonable diligence have discovered and produced at the trial. [23]

V.

Error in law, occurring at the trial and excepted to at the time by defendants, and each of them.

This motion is made and based upon the records, files, and proceedings herein, upon the journal and court records of the clerk of said court, and upon the stenographic notes of the reporter who reported said cause.

Dated at Spokane, Washington, this 20th day of November, A. D. 1922.

JOSEPH J. LAVIN,

L. B. DONLEY,

Attorneys for Defendants, Leroy Powers and Dick Cooke.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 21, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [24]

AND AFTERWARD, on the 4th day of January, 1922, the same being the 84th day of the regular September, 1922, term of said court, court convened pursuant to adjournment—Present: Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington, presiding.

Among the proceedings had were the following:

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEROY POWERS,

Defendant.

Sentence.

Now on this day into court comes the above-named defendant for sentence, and being informed by the Court of his conviction herein of record, he is asked by the Court if he has any legal cause to show why the judgment of this Court should not now be pronounced in his case; he nothing says, save as he before hath said.

WHEREUPON it is now by the Court CONSIDERED and ADJUDGED that said defendant, now before the court, be confined in the United States Penitentiary at McNeil's Island, State of Washington, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for the period of One year & one day from this date, and pay a fine of two thousand dollars, to stand committed until he is duly discharged by law; and now the said defendant is committed to the custody of the Marshal of the United States for the Eastern District of Washington, who will carry this sentence into execution.

Filed in the U. S. District Court, Eastern District of Washington. Jan. 4, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [25]

Journal Entries.

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

September, 1922 Term—84th day—Thursday, Jan-
uary 4, 1923.

Court met pursuant to adjournment at 10 A. M.
Present: Honorable FRANK H. RUDKIN,
Judge, Frank R. Jeffrey, U. S. District Attor-
ney, A. F. Kees, U. S. Marshal, C. W. Gray
and C. H. Cummings, Bailiffs, D. L. Hyatt,
Crier, and Alan G. Paine, Clerk.

PROCEEDINGS:

* * * * *

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD et al.,

Defendants.

Order Overruling Motions.

The above-entitled cause having come on regu-
larly for hearing on this date on motion for acquit-
tal, motion for new trial and motion for arrest of
judgment, and said motions having been argued
by counsel, and the Court being fully advised in
the premises,

It is ORDERED that said motions be, and the same are hereby denied.

* * * * *

Thereupon Court adjourned until 10 A. M. to-morrow.

FRANK H. RUDKIN,

Judge. [26]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

September, 1922, Term—84th day—Thursday, January 4, 1923.

Court met pursuant to adjournment at 10 A. M.
Present: Honorable FRANK H. RUDKIN, Judge,
Frank R. Jeffrey, U. S. District Attorney, A. F. Kees, U. S. Marshal, C. W. Gray and C. H. Cummings, Bailiffs, D. L. Hyatt, Crier, and Alan G. Paine, Clerk.

PROCEEDINGS:

* * * * *

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, LEROY POWERS,
JESSE B. COOKE et al.,

Defendants.

Order Fixing Time to File Bill of Exceptions, etc.

Now on this day, counsel for the above-named defendants appeared in Court, and moved for ex-

tension of time in which to file bill of exceptions in the above-entitled cause, and the Court being fully advised in the premises,

It is ORDERED that defendants be granted sixty days from this date in which to file their bill of exceptions, and it is further ordered that supersedeas bond be and hereby is fixed in the sum of Three Thousand Dollars each.

* * * * *

Thereupon Court adjourned until 10 A. M. tomorrow.

FRANK H. RUDKIN,
Judge. [27]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 4110.

UNITED STATES,

Plaintiff,

vs.

CLYNE LEDGERWOOD et al.,

Defendants.

Order Extending Time Sixty Days to File Bill of Exceptions.

This matter coming on for hearing upon the motion of defendant Roy Powers,

IT IS HEREBY ORDERED that the defendant, Roy Powers, be, and he is hereby granted sixty days from March 5th, 1923, in which to prepare,

have signed and file a bill of exceptions in the above-entitled cause.

Done in open court this 24th day of February, 1923.

JEREMIAH NETERER,
Judge.

O. K.—F. R. JEFFREY,
U. S. Attorney.

Filed in the U. S. District Court, Eastern District of Washington. Feb. 24, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [28]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 4110.

UNITED STATES,

Plaintiff,

vs.

CLYNE LEDGERWOOD et al.,

Defendants.

Order Extending Time Thirty Days to File Bill of Exceptions.

This matter coming on for hearing upon the motion of defendant Roy Powers,—

IT IS HEREBY ORDERED, that the defendant, Roy Powers, be and he is hereby granted thirty days from May 5th, 1923, in which to prepare, have signed and file a bill of exceptions in the above entitled cause.

Done in open court this 25th day of April, 1923.

JEREMIAH NETERER,
Judge.

O. K.—F. R. JEFFREY,
U. S. Atty.

Filed in the U. S. District Court, Eastern District of Washington. Apr. 25, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [29]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLYNE LEDGERWOOD, J. GUY DUNGAN,
ROY POWERS, JESSE B. COOKE,
THOMAS BARKER and JOHN WOODS,
Defendants.

Petition for Writ of Error.

Comes now Roy Powers, one of the defendants herein, and says that on or about the 5th day of January, 1923, this Court entered sentence and judgment against the said defendant, Roy Powers, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of defendant, all of which will appear more in detail from the assignment of errors, which is filed with this petition.

WHEREFORE, the said Roy Powers prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals in and for the Ninth Circuit of the United States, for the correction of the errors so complained of, and that the Court fix the bond to operate also as a supersedeas, and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

MUNTER & MUNTER,
POWELL & HERMAN,

Attorneys for Defendant Roy Powers.

Served 4/28/23.

H. SYLVESTER GARVIN,
Asst. U. S. Attorney.

Filed in the U. S. Dist. Court, Eastern Dist. of Washington. April 28, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [30]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLYNE LEDGERWOOD, J. GUY DUNGAN,
ROY POWERS, JESSE B. COOKE,
JOHN WOODS and THOMAS BARKER.

Defendants.

Order Allowing Writ of Error.

On this 28 day of April, 1923, came one of the defendants Roy Powers and filed herein and presented to the Court his petition praying for the allowance of a writ of error, and filed therewith his assignments of error, intended to be urged by him, and prayed that the bond to be given to operate also as a supersedeas and stay bond, be fixed by the Court, and also that a transcript of the record and proceedings and papers upon which judgment and sentence herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may be proper in the premises.

In consideration thereof, the Court does allow the writ of error, and the bond for such writ of error and also to operate as a supersedeas, is fixed in the sum of \$3000.00, and upon defendant giving such bond, all proceedings to enforce said sentence and judgment to be stayed, until such writ of error is determined.

JEREMIAH NETERER,

United States District Judge.

Served 4/28/23.

H. SYLVESTER GARVIN,

Asst. U. S. Atty.'

Filed in the U. S. District Court, Eastern District of Washington. Apr. 28, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [31]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLYNE LEDGERWOOD, J. GUY DUNGAN,
ROY POWERS, JESSE B. COOKE,
JOHN WOODS and THOMAS BARKER,
Defendants.

Writ of Error (Copy).

The President of the United States to the Honorable Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, GREETING:

Because in the records and proceedings as also in the rendition of judgment and sentence on a plea, which in the said District Court before you, or some of you, between the above named defendants and particularly the defendant Roy Powers, plaintiff in error (defendant in the lower court), and the United States of America, plaintiff in error (plaintiff in the lower court), manifest error hath happened, to the great damage of the said Roy Powers, plaintiff in error as by his complaint appears:

We being willing that error, if any hath happened, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf

duly command you, if judgment therein be given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same *at the same* at the city of San Francisco, in the State of California, within thirty days from the date of this writ in the said Circuit Court of Appeals, to be then and there held, that the [32] records and proceedings aforesaid, being inspected, this said Circuit Court of Appeals may cause further to be done therein to correct that error of what right and according to the law and custom of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 28th day of April, 1923, in the year of our Lord one thousand nine hundred twenty-three.

ALAN G. PAINE,
Clerk of the United States District Court, for the
Eastern District of Washington, Northern
Division.

Approved by:

JEREMIAH NETERER,
Judge.

Served 4/28/23.

H. SYLVESTER GARVIN,
Asst. U. S. Atty.

Filed in the U. S. Dist. Court, Eastern District of Washington. Apr. 28, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [33]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLYNE LEDGERWOOD, J. GUY DUNGAN,
ROY POWERS, JESSE B. COOKE,
JOHN WOODS and THOMAS BARKER,
Defendants.

Citation on Writ of Error (Copy).

The President of the United States, to the United
States of America, and the Messrs. F. R.
JEFFREY and H. SYLVESTER GARVIN,
Your Attorneys, GREETING:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be held at the City
of Seattle, in the State of Washington, within thirty
day from the date of this writ, pursuant to a writ
of error, regularly issued, and which is on file in the
office of the clerk of the District Court of the United
States, for the Eastern District of Washington,
Northern Division, in an action pending in said
court, wherein Roy Powers is plaintiff in error
(defendant in the lower court), and the United
States of America, is defendant in error (plaintiff

in the lower court), and to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 28th day of Apr. 1923.

JEREMIAH NETERER,
United States District Judge.

Attest: ALAN G. PAINE,
Clerk of Said Court.

Served 4/28/23.

H. SYLVESTER GARVIN,
Asst. U. S. Atty. [34]

Filed in the U. S. District Court, Eastern District of Washington. April 28, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [35]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER,
J. GUY DUNGAN, JESSE B. COOKE, *alias*
DICK COOKE, N. F. CARPENTER, LE-
ROY POWERS, Otherwise Known as ROY
POWERS and JOHN WOODS,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, Leroy Powers, otherwise known as Roy Powers, as principal, and W. J. Hall, unmarried, and Mary McCullough, his wife, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Three Thousand (\$3,000.00) Dollars, to be paid to the United States of America, to which payment well and truly to be paid, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this —— day of May, in the year of our Lord, one thousand nine hundred twenty-three.

WHEREAS, lately at the September term, A. D. 1922, of the District Court of the United States, for the Eastern District of Washington, Northern Division, in a suit pending in said court, between the United States of America, plaintiff, and Leroy Powers, otherwise known as Roy Powers, defendant, a judgment and sentence was rendered against the Leroy Powers, otherwise known as Roy Powers, and the said Leroy Powers, otherwise known as Roy Powers, has obtained a writ of error from [36] the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America, to be

and appear in the United States Circuit Court of Appeals, for the Ninth Circuit at the city of San Francisco, State of California, — days from and after the date of said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said Leroy Powers, otherwise known as Roy Powers, shall appear, either in person or by attorney, in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause, in said court, and prosecute his said writ of error, and abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in the execution of the judgment and sentence appealed from, as said court may direct, if the judgment and sentence against him shall be affirmed, or the writ of error or appeal is dismissed; and if he shall appear for trial in the District Court of the United States, for the Eastern District of Washington, Northern Division, on such day or days as may be appointed for a retrial, by said District Court, and abide by and obey all orders made by said court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth

Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

LEROY POWERS, Principal.

W. J. HALL. (Seal)

B. W. RIORDAN. (Seal)

O. J. McCULLOUGH. (Seal)

MARY McCULLOUGH. (Seal)

O. K.—FRANK R. JEFFREY,

U. S. Atty.

Filed in the U. S. District Court, Eastern District of Washington. May 9, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [37]

State of Washington,
County of Spokane,—ss.

W. J. Hall, unmarried, and B. W. Riordan, unmarried and O. J. McCullough, and Mary McCullough, his wife, being first duly sworn according to law, on their oaths respectively says, each for himself, and not one for the other: That he is one of the sureties who signed the within bond; that he is above the age of twenty-one years; that he is a *bona fide* resident of the State of Washington, and a property holder therein; that he is worth the sum of Three Thousand (\$3,000) Dollars, in his own individual and separate property in said state, over and above all his debts and liabilities, and property exempt from execution.

B. W. RIORDAN.

W. J. HALL.

O. J. McCULLOUGH.

MARY McCULLOUGH.

Subscribed and sworn to before me this 5th day of May, 1923.

J. E. RITTER,
Notary Public for the State of Washington, Residing in Republic.

Approved May 9, 1923.

J. STANLEY WEBSTER,
Judge.

Approved May 5th, 1923.

[Seal] JOHN E. RITTER,
United States Commissioner. [38]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 4110.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER,
J. GUY DUNGAN, JESSE B. COOKE,
alias DICK COOKE, F. R. CARPENTER,
LEROY POWERS, Otherwise Known as
ROY POWERS, and JOHN WOODS,
Defendants.

Assignment of Errors.

Comes now the defendant, Leroy Powers, otherwise known as Roy Powers, and herein files and claims his assignment of errors, committed by the trial judge in the proceedings of the trial in the above-entitled cause, to wit:

I.

That the Court erred in refusing to quash the indictment in the above-entitled cause as requested by said Leroy Powers, otherwise known as Roy Powers, in his motion for an order setting aside and quashing the said indictment upon the grounds and reasons stated in said motion.

II.

That the Court erred in not granting an order requiring the plaintiff to elect as to whether the Government should proceed to trial upon counts one and two of said indictment or upon counts three and four of said indictment as requested by said defendant in his motion now on file herein.

III.

That the Court erred in overruling said defendant's motion for judgment of acquittal notwithstanding the verdict upon the grounds and for the reasons stated in said motion which is now on file herein. [39]

IV.

That the Court erred in not granting said defendant's motion in arrest of judgment upon the grounds and reasons stated in said motion to which reference is hereby made.

V.

That the Court erred in refusing to grant a new trial to said defendant upon the grounds and reasons stated in said motion.

MUNTER & MUNTER,
POWELL & HERMAN,

Attorneys for Defendant, Leroy Powers, Otherwise known as Roy Powers.

Served 4/28/23.

H. SYLVESTER GARVIN,
Asst. U. S. Atty.

Filed in the U. S. District Court, Eastern District
of Washington. Apr. 28, 1923. Alan G. Paine,
Clerk. By A. P. Rumburg, Deputy. [40]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 4110.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER,
J. GUY DUNGAN, JESSE B. COOKE,
alias DICK COOKE, N. F. CARPENTER,
LEROY POWERS, Otherwise Known as
ROY POWERS, and JOHN WOODS,
Defendants.

Before Honorable J. STANLEY WEBSTER,
District Judge.

Appearances.

For the Plaintiff:

FRANK R. JEFFREY, U. S. District Attorney.
H. SYLVESTER GARVIN, Asst. U. S. District
Attorney.

For the Defendants:

MUNTER & MUNTER, and
POWELL & HERMAN. [41]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER, J.
GUY DUNGAN, JESSE B. COOKE,
alias DICK COOKE, N. F. CARPENTER,
LEROY POWERS, Otherwise Known as
ROY POWERS, and JOHN WOODS,

Defendants.

**Notice of Preparation and Filing of Bill of
Exceptions.**

To the Above-named Plaintiff and to Messrs.
Frank R. Jeffrey and H. Sylvester Garvin,
Your Attorneys:

You and each of you are hereby notified that
the defendant LeRoy Powers, otherwise known as
Roy Powers, has prepared and filed with the Clerk
of the above-entitled court a proposed bill of ex-
ceptions, a copy of which is herewith served upon
you.

Dated at Spokane, Washington, this 21st day of
May, 1923.

MUNTER & MUNTER,
POWELL & HERMAN,

Attorneys for Defendant Roy Powers.

Service of the above and foregoing notice and of the bill of exceptions attached thereto, by true copy thereof, is hereby acknowledged this 22d day of May, 1923.

FRANK R. JEFFREY,
U. S. District Attorney.

Filed in the U. S. District Court, Eastern District of Washington. May 29, 1923. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [42]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 4110.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER,
J. GUY DUNGAN, JESSE B. COOKE,
alias DICK COOKE, N. F. CARPENTER,
LEROY POWERS, Otherwise Known as
ROY POWERS, and JOHN WOODS,
Defendants.

Stipulation Re Bill of Exceptions.

IT IS HEREBY AGREED AND STIPULATED by and between Frank R. Jeffrey, United States District Attorney, attorney for the United States of America, plaintiff, and Messrs. Munter & Munter and Powell & Herman, attorneys for defendant Leroy Powers, otherwise known as Roy Powers:

I.

That the attached bill of exceptions is a true and correct statement of the matters and things therein alleged and set forth.

II.

IT IS FURTHER AGREED AND STIPULATED by and between the same parties that Honorable J. Stanley Webster, United States Judge for the Eastern District of Washington, successor to Honorable Frank H. Rudkin, the Judge before whom the above-entitled action was tried, may certify and settle the attached bill of exceptions.

Dated: at Spokane, Washington, this 28th day of May, A. D. 1923.

FRANK R. JEFFREY,
United States District Attorney.

POWELL & HERMAN,
MUNTER & MUNTER,
Attorneys for Defendant Leroy Powers.

Filed in the U. S. District Court, Eastern District of Washington. May 29, 1923. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [43]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER,
J. GUY DUNGAN, JESSE B. COOKE,
alias DICK COOKE, N. F. CARPENTER,
LEROY POWERS, Otherwise Known as
ROY POWERS, and JOHN WOODS,
Defendants.

Bill of Exceptions.

APPEARANCES.

For the Plaintiff:

FRANK R. JEFFREY, U. S. District Attorney.
H. SYLVESTER GARVIN, Asst. District At-
torney.

For the Defendant:

MUNTER & MUNTER and
POWELL & HERMAN.

BE IT REMEMBERED, That the above-entitled
cause came on regularly for hearing in the above-
entitled court on the —— day of November, 1922, at
10 o'clock A. M. before the Hon. F. H. Rudkin,
then District Judge, plaintiff appearing by Frank
R. Jeffrey, U. S. District Attorney and H. Sylves-
ter Garvin, Asst. U. S. District Attorney, and the

defendant appearing in person and by his attorneys, Munter & Munter and Powell & Herman, thereupon the following proceedings were had and done to wit:

Counsel for defendant Leroy Powers, otherwise known as Roy Powers, brought on said defendant's action to quash the indictment in the above-entitled cause, and did also bring on [44] for hearing said defendant's motion in the alternative to compel the plaintiff to elect as to which counts said defendant would be prosecuted in the event that the motion to quash said indictment was overruled. Both the motion to quash and the motion in the alternative to compel the plaintiff to elect were overruled, and to each of the Court's rulings on each of the said motions, the defendant did except and an exception to each was duly allowed.

THEREUPON, a jury was duly empaneled and sworn to try the cause.

Testimony was introduced by the plaintiff which tended to support all four counts of said indictment. Defendant excepted to the introduction of testimony supporting all four of the said counts of the said indictment. The objection of defendant to the introduction of testimony tending to support all four of the counts of said indictment was overruled to all of which the said defendant excepted and as to all of which exceptions were allowed.

At the close of the plaintiff's testimony in support of its prosecution, said defendant again renewed defendant's motion to quash said indictment on the ground that there was a misjoinder of

counts which motion was denied, to which ruling said defendant excepted, and to which ruling defendant was allowed an exception, and said defendant did thereupon renew said defendant's motion in the alternative to compel the plaintiff to elect as to which counts of said indictment, said plaintiff would prosecute said defendant, which motion to compel an election was overruled to which the said defendant excepted and to which ruling said defendant was allowed an exception.

Thereafter defendant introduced testimony on his own behalf. [45]

Thereafter testimony was introduced by the Government in rebuttal of defendant's testimony.

Thereafter the counsel addressed the jury and the jury was instructed by the Hon. F. H. Rudkin, then District Judge.

The jury thereafter returned a verdict of guilty as to this defendant on the second count of the said indictment, and not guilty on the other counts of said indictment.

Thereafter said defendant made a motion to arrest said judgment, notwithstanding the verdict of the jury and a motion for new trial, all of which motions were overruled by the Honorable Frank H. Rudkin, then United States District Judge to all of which rulings the defendant excepted and to all of which rulings the defendant was allowed an exception. [46]

Certificate of Judge to Bill of Exceptions.

United States of America,
Eastern District of Washington,—ss.

I, J. Stanley Webster, U. S. District Judge for the Eastern District of Washington, and the successor to the Judge before whom the above-entitled action was tried, to wit, the cause entitled United States of America, Plaintiff, vs. Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke, *alias* Dick Cooke, N. F. Carpenter, Leroy Powers, otherwise known as Roy Powers and John Woods, Defendants, which is No. 4110, in said District Court, DO HEREBY CERTIFY, that the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record therein; and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; and that the above and foregoing bill of exceptions was duly and regularly filed with the Clerk of the said Court and thereafter duly and regularly served within the time authorized by law; and that no amendments were proposed to said bill of exceptions excepting such as are embodied therein that due and regular written notice of application to the Court for settlement and certifying said bill of exceptions was made and served upon the plaintiff, which notice specified the place and time, to settle and certify said bill of exceptions.

Dated at Spokane, Washington, this 29th day of May, 1923.

J. STANLEY WEBSTER,
Judge. [47]

Filed in the U. S. District Court, Eastern District of Washington. May 29, 1923. Alan G. Paine. Eva M. Hardin, Deputy. [48]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 4110.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER,
J. GUY DUNGAN, JESSE B. COOK,
alias DICK COOKE, N. F. CARPENTER,
LEROY POWERS, Otherwise Known as
ROY POWERS, and JOHN WOODS,
Defendants.

Stipulation Re Citation on Writ of Error.

It is hereby agreed and stipulated by and between the United States of America, Plaintiff, and Leroy Powers, otherwise known as Roy Powers, Defendant, that the citation on the writ of error shall admonish the United States of America, and Messrs. Frank R. Jeffrey and H. Sylvester Garvin, their attorneys, to be and appear at the United

States Circuit Court of Appeals in and for the Ninth Circuit on the 5th day of June, 1923.

FRANK R. JEFFREY,

United States District Attorney.

MUNTER & MUNTER,

POWELL & HERMAN,

Attorneys for Defendant Leroy Powers.

Filed in the U. S. District Court, Eastern District of Washington. May 29, 1923. Alan G. Paine. A. P. Rumburg, Deputy. [49]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER,
J. GUY DUNGAN, JESSE B. COOKE,
alias DICK COOKE, R. F. CARPENTER,
LEROY POWERS, Otherwise Known as
ROY POWERS, and JOHN WOODS.

Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

Please make up and certify to the Circuit Court of Appeals, Ninth Judicial Circuit, the following papers and records in the above-entitled cause:

1. Indictment.
2. Verdict of the jury.
3. Minutes of the Judge's notes.
4. Motion to quash indictment and to compel the Government to elect as to which counts it would prosecute defendant Powers.
5. Order denying said motion.
6. Motion of defendant for judgment of acquittal notwithstanding the verdict of the jury.
7. Motion in arrest of judgment.
8. Motion for new trial.
9. Judgment and sentence of the Court.
10. All journal entries or orders made by the Court denying each and all of the motions and applications made by defendant.
11. Order allowing sixty days to file transcript.
12. Order allowing sixty days additional to file transcript.
13. Order allowing thirty days additional to file transcript. [50]
14. Petition for writ of error.
15. Order allowing writ of error and fixing bond on writ of error in the sum of Three Thousand (\$3000.00) Dollars.
16. Writ of error.
17. Citation.
18. Bond and approval thereof.
19. Defendant's assignments of error.
20. Notice on bill of exceptions.
21. Stipulation that Hon. J. Stanley Webster certify and settle bill of exceptions.
22. Defendant's bill of exceptions duly certified.

23. Stipulation extending time of citation on writ of error.

24. Praeceptum.

POWELL & HERMAN,

MUNTER & MUNTER,

Attorneys for Defendant Leroy Powers.

Filed in the U. S. District Court, Eastern District of Washington. May 14, 1923. Alan G. Paine, Clerk Eva M. Hardin, Deputy. [51]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLINE LEDGERWOOD, THOMAS BARKER,
J. GUY DUNGAN, JESSE B. COOKE,
alias DICK COOKE, N. F. CARPENTER,
LEROY POWERS, Otherwise Known as
ROY POWERS and JOHN WOODS,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,

Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk, of the District Court of the United States for the Eastern District of

Washington, do hereby certify the foregoing printed pages, to be a full, true, correct and complete copy of so much of the record, papers, bill of exceptions and other proceedings so called for by the defendant and plaintiff in error in its praecipe therefor and as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on writ of error from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

I further certify that the cost of preparing, certifying [52] and printing the foregoing transcript is the sum of Eighteen and 5/100 Dollars (\$18.05), and that the same has been paid to me by the attorneys for defendant, and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of Spokane, in said district, this 31st day of May, A. D. 1923.

[Seal]

ALAN G. PAINE,
Clerk. [53]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLYNE LEDGERWOOD, J. GUY DUNGAN,
ROY POWERS, JESSE B. COOKE,
JOHN WOODS and THOMAS BARKER,
Defendants.

Writ of Error (Original).

The President of the United States to the Honorable
Judge of the District Court of the United
States, for the Eastern District of Washing-
ton, Northern Division, GREETING:

Because in the records and proceedings as also in
the rendition of judgment and sentence on a plea,
which in the said District Court before you, or
some of you, between the above-named defendants
and particularly the defendant Roy Powers, plain-
tiff in error (defendant in the lower court), and
the United States of America, defendant in error
(plaintiff in the lower court), manifest error hath
happened, to the great damage of the said Roy
Powers, plaintiff in error as by his complaint ap-
pears:

We being willing that error, if any hath hap-
pened, shall be duly corrected, and full and speedy

justice done to the parties aforesaid, in this behalf duly command you, if judgment therein be given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at the same at the City of San Francisco, in the State of California, within thirty days from the date of this writ in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid, being inspected, this said Circuit Court of [54] Appeals may cause further to be done therein to correct that error of what right and according to the law and custom of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 28th day of April, 1923, in the year of our Lord one thousand nine hundred twenty-three.

ALAN G. PAINE,
Clerk of the United States District Court, for the
Eastern District of Washington, Northern
Division.

Allowed by:

JEREMIAH NETERER, .
Judge.

Served 4/28/23.

H. SYLVESTER GARVIN,
Asst. U. S. Atty.

[Endorsed]: No. 4110. United States of America vs. Cline Ledgerwood et al. Writ of Error. Filed in the U. S. District Court, Eastern District of Washington. Apr. 28, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [55]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 4110.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLYNE LEDGERWOOD, J. GUY DUNGAN,
ROY POWERS, JESSE B. COOKE,
JOHN WOODS and THOMAS BARKER,
Defendants.

Citation on Writ of Error (Original).

The President of the United States to the United States of America, and the Messrs. F. R. JEFFREY and H. SYLVESTER GARVIN, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of Seattle, in the State of Washington, within thirty days from the date of this writ, pursuant to a writ of error, regularly issued, and which is on file in the office of the clerk of the District Court

of the United States, for the Eastern District of Washington, Northern Division, in an action pending in said court, wherein Roy Powers is plaintiff in error (defendant in the lower court), and the United States of America, is a defendant in error (plaintiff in the lower court), and to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS The Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 28th day of April, 1923.

JEREMIAH NETERER,
United States District Judge.
Attest: ALAN G. PAINE,
Clerk of said Court.

Served 4/28/23.

H. SYLVESTER GARVIN,
Asst. U. S. Atty.

[Endorsed]: No. 4110. United States of America vs. Cline Ledgerwood et al. Citation. Filed in the U. S. District Court, Eastern Dist. of Washington. Apr. 28, 1923. Alan G. Paine, Clerk. A. P. Rumburg, [56]

[Endorsed]: No. 4047. United States Circuit Court of Appeals for the Ninth Circuit. Leroy Powers, Otherwise Known as Roy Powers, Plaintiff in Error, vs. The United States of America,

Defendant in Error. Transcript of Record.
Upon Writ of Error to the United States District
Court of the Eastern District of Washington,
Northern Division.

Received June 4, 1923.

F. D. MONCKTON,
Clerk.

Filed June 15, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States

Circuit Court of Appeals

for the Ninth Circuit

LEROY POWERS (otherwise
known as ROY POWERS),
Plaintiff in Error,

vs.

No. 4047

THE UNITED STATES OF
AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

MUNTER & MUNTER,
POWELL & HERMAN,
Attorneys for Plaintiff in Error.

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In the United States
Circuit Court of Appeals
for the Ninth Circuit

LEROY POWERS (otherwise
known as ROY POWERS),
Plaintiff in Error,
vs.

No. 4047

THE UNITED STATES OF
AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error, Leroy Powers, otherwise known as Roy Powers, was arrested and charged, together with Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke (alias Dick Cook), R. F. Carpenter and John Woods, with conspiring to violate the National Prohibition Act, that is, the Act of Congress of October 28, 1919, and was also charged, with the other defendants hereinbefore named, with conspiring to violate the Act of Congress of March 3, 1917, known as the Reed "Bone Dry" Amendment. Both of these conspiracies were

charged by the same indictment, said indictment consisting of four counts, and, omitting the formal parts, being as follows:

COUNT I.

The Grand Jurors of the United States, chosen, selected and sworn in and for the Northern Division of the Eastern District of Washington, upon their oaths present:

That heretofore, to wit: on or about the first day of May, 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke (alias Dick Cook), R. F. Carpenter, Le Roy Powers and John Woods, whose other or true names are to the Grand Jurors unknown, defendants herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown, to commit the acts made offenses and crimes by the laws of the United States, to wit: the Act of Congress of October 28, 1919, known as the National Prohibition Act; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors

unknown (all of the said individuals, including the said defendants and the said divers other persons, being hereinafter in this indictment called "conspirators," and who are intended and referred to wherever the word "conspirators" may hereafter appear); to devise and execute a scheme whereby they, the said conspirators, working in conjunction with each other, would procure and cause to be procured for their intended use intoxicating liquors of various varieties for the purpose of possessing the same for beverage purposes, as the said conspirators might deem fit and proper with the intention of selling, bartering, exchanging, giving away and furnishing; that is, the said conspirators conspired and agreed together to possess intoxicating liquors containing more than one-half of one per centum of alcohol by volume and the same being then and there fit for beverage purposes, within the State and Eastern District of Washington, without they or any one of them having first obtained a permit to so possess intoxicating liquors, as is required by law to be obtained.

And the Grand Jurors aforesaid do further present and find:

That the said conspirators did on or about the 27th day of July, 1922, at Republic, Ferry County, in the Eastern District of Washington and within the jurisdiction of this court, renew and continue

the said conspiracy, and that in pursuance of the said unlawful and felonious conspiracy, combination, confederation and agreement, it was furthermore a part of the said conspiracy that they would assist others who might be engaged in the illegal possession of intoxicating liquor, in violation of the National Prohibition Act, and that they would provide a safe place for the temporary storing, keeping and concealment of intoxicating liquors that was owned and possessed by themselves or other persons to the Grand Jurors unknown.

And the Grand Jurors aforesaid do further find and present:

That the aforesaid wilful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the first day of May, 1921, in Ferry County, within the State and Eastern District of Washington (the exact place being to the Grand Jurors unknown), and that it was furthermore a part of the said scheme that the conspiracy was to be a continuing one, and it was continued in existence, operation and execution from about the first day of May, 1921, until the seventh day of August, 1922, and that at all times between the said dates the said defendants and the divers persons to the Grand Jurors unknown, did continue to wilfully, unlawfully and feloniously conspire,

confederate and agree together to commit the acts hereafter set forth in detail.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That in pursuance of the said unlawful and felonious conspiracy, combination and agreement and to effect the object of the same the said conspirators did wilfully and unlawfully perform and do the following acts:

I.

That on or about the 26th day of July, 1922, in Republic, Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully keep and conceal about twenty (20) cases of intoxicating liquor, the exact amount of which is to the Grand Jurors unknown, said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes, said intoxicating liquor being the property of certain persons named Joseph H. Frankel and Henry Dapper.

II.

That on or about the 27th day of July, 1922, at Republic, Ferry County, in the State and East-

ern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully steal from Joseph H. Frankel and Henry Dapper about twenty (20) cases of intoxicating liquor (the amount of which is to the Grand Jurors unknown), said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

III.

That on or about the 27th day of July, 1922, at Republic, Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully possess about twenty (20) cases of intoxicating liquor (the exact amount of which is to the Grand Jurors unknown), said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT II.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: on or about the 1st day of May, 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke (alias Dick Cook), R. F. Carpenter, Leroy Powers and John Woods, whose other or true names are to the Grand Jurors unknown, defendants herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown to commit the acts made offenses and crimes by the laws of the United States, to wit: the Act of Congress of October 28, 1919, known as the National Prohibition Act; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other person to the Grand Jurors unknown (all of the said individuals, including the said defendants and the said divers other persons, being hereafter in this indictment called "conspirators," and who are intended and referred to wherever the word "conspirators" may hereafter appear), that they, the said conspirators, working in conjunction with each other would aid, abet and counsel certain persons who were engaged in the unlawful possession and transportation of liquor

from the Dominion of Canada into the United States of America, and particularly in Ferry County in the Eastern District of Washington and within the jurisdiction of this court; it was a part of the said unlawful and felonious conspiracy so entered into by the said conspirators that they would become acquainted with persons engaged in the unlawful liquor traffic and commonly known as or termed "bootleggers" and offer to aid and assist them and guarantee them protection while in transit through the said County of Ferry, in the State of Washington; that they, the said conspirators, would furnish automobiles to transport the liquor from a point near the American line to and into the Town of Republic, and that some of the said conspirators would accompany the person or persons in the bootlegging business so as to afford them proper security and protection in their unlawful business; that they would collect from the various bootleggers sums of money for such service as they would render in assisting them in the actual transportation of intoxicating liquor within the state and Eastern District of Washington without they or any one of them having first obtained a permit to transport intoxicating liquors, as is required by law to be obtained.

And the Grand Jurors do further find and present:

That the said conspirators did on or about the 22d day of May, 1922, in Ferry County, in the Eastern District of Washington and within the jurisdiction of this court, renew and continue the said conspiracy and that in pursuance of the said unlawful and felonious conspiracy, combination, confederation and agreement it was further more a part of the said conspiracy that they would assist, aid and abet certain persons engaged in the illegal transportation of intoxicating liquors, containing more than one-half of one per centum of alcohol by volume, being then and there fit for beverage purposes, in violation of the National Prohibition Act.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and say:

That the aforesaid wilful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the first day of May, 1921, in Ferry County, within the State and Eastern District of Washington (the exact time being to the Grand Jurors unknown); that it was a part of the said scheme that the said conspiracy was to be a continuing one, and it was continued in existence, operation and execution from about the first day of May, 1921, until the seventh day of August, 1922, and that at all times between the said dates the said defendants and the divers other persons to the

Grand Jurors unknown did continue to wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the acts hereinafter set forth in detail.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That in pursuance of the said unlawful and felonious conspiracy, combination and agreement and to effect the object of the same, that on or about the date hereinafter designated, in Ferry County, within the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully perform and do the following acts:

I.

That on or about the 24th day of May, 1922, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully assist, aid and abet in the transportation of about ten (10) cases of intoxicating liquor, the exact amount of which is to the Grand Jurors unknown, from a point near the Canadian line in Ferry County to and into the Town of Republic, the said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

II.

That on or about the 10th day of July, 1922, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully assist, aid and abet in the transportation of about fifteen (15) cases of whiskey, the exact amount of which is to the Grand Jurors unknown, from a point near the Canadian line, in Ferry County, to and into the Town of Republic, the said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

III.

That on or about the 28th day of July, 1922, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully assist, aid and abet in the transportation of about twenty (20) cases of whiskey, the exact amount of which is to the Grand Jurors unknown, from a point near the Canadian line in Ferry County to and into the Town of Republic, the said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume, and then and there being fit for beverage purposes.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT III.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: on or about the 1st day of May, 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke (alias Dick Cook), R. F. Carpenter, Leroy Powers and John Woods, whose other or true names are to the Grand Jurors unknown, defendants herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown, to commit the acts made offenses and crimes by the laws of the United States, to wit: the Act of Congress of March 3, 1917 (39 Stats. 1069), known as the Reed "Bone Dry" Amendment; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown (all of the said individuals, including the said defendants and the

said divers other persons, being hereafter in this indictment called "conspirators" and who are intended and referred to wherever the word "conspirators" may hereafter appear), that they, the said conspirators, working in conjunction with each other, did aid, abet and counsel certain persons who were engaged in the unlawful transportation of liquor from the State of Washington into other states, and particularly into the city of Portland, in the State of Oregon; it is furthermore a part of the said unlawful and felonious conspiracy, so entered into by the said conspirators, that they would become acquainted with persons who were engaged in the unlawful transportation of intoxicating liquor and in pursuance of the said unlawful conspiracy that they, the said conspirators, would aid and assist them in the transporting and in causing to be transported in interstate commerce quantities of intoxicating liquor from the Town of Republic, in Ferry County, in the State and Eastern District of Washington and within the jurisdiction of this court, to and into the City of Portland, in the State and District of Oregon, via the Great Northern Railway Company and connecting railways, the said Great Northern Railway Company and the said connecting railways then and there being engaged in interstate commerce by lines of railway in the States of Washington and Oregon, and the

laws of the State of Oregon prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and the said intoxicating liquor not being transported, as aforesaid, for scientific, sacramental, medicinal and mechanical purposes; and the Grand Jurors do further find and present that the said conspirators did, on or about the 25th day of May, 1922, at Republic, in Ferry County, in the State of Washington and within the jurisdiction of this court, renew and continue the said conspiracy, and that the aforesaid wilful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the first day of May, 1921, in Ferry County, within the State and Eastern District of Washington (the exact time being to the Grand Jurors unknown); that it was a part of the said scheme that the said conspiracy was to be a continuing one, and it was continued in existence, operation and execution from about the first day of May, 1921, until the 7th day of August, 1922, and that at all times between the said dates the said defendants and the divers other persons to the Grand Jurors unknown did continue to wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the acts hereinafter set forth in detail, and that in pursuance of the said unlawful and felonious conspiracy, combination and agreement and to effect

the object of the same, the said conspirators did wilfully and unlawfully perform and do the following act:

That on or about the 25th day of May, 1922, at Republic, in Ferry County, in the State and Eastern District of Washington and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully assist, aid and abet Joseph H. Frankel in transporting and causing to be transported in interstate commerce a quantity of intoxicating liquor, to wit: about ten (10) cases of Canadian whiskey, to and into the City of Portland, in the State and District of Oregon, via the Great Northern Railway Company and connecting railways, said Great Northern and the said connecting railways then and there being engaged in interstate commerce by line of railway in the States of Washington and Oregon, and the laws of the State of Oregon prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and said intoxicating liquor not being transported, as aforesaid, for scientific, sacramental, medicinal and mechanical purposes, but was then and there fit for beverage purposes and contained more than one-half of one per centum of alcohol by volume, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT IV.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: on or about the 1st day of May, 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke (alias Dick Cook), R. F. Carpenter, Leroy Powers and John Woods, whose other or true names are to the Grand Jurors unknown, defendants herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown to commit the acts and offenses and crimes by the laws of the United States, to wit: the Act of Congress of March 3, 1917 (39 Stats. 1069), known as the "Bone Dry" Amendment; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown (all of the said individuals, including the said defendants and the said divers other persons, being hereinafter in this indictment called "conspirators," and who are intended and referred to wherever the word "conspir-

ators" may hereafter appear), that they, the said conspirators, working in conjunction with each other, did aid, abet and counsel certain persons who were engaged in the unlawful transportation of liquor from the State of Washington into other states, and particularly into the town of Pocatello, in the State of Idaho; it is furthermore a part of the said unlawful and felonious conspiracy, so entered into by the said conspirators, that they would become acquainted with persons who were engaged in the unlawful transportation of intoxicating liquor and in pursuance of said unlawful conspiracy that they, the said conspirators, would aid and assist them in the transporting and in causing to be transported in interstate commerce quantities of intoxicating liquor from the town of Republic, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, to and into the town of Pocatello, in the State and District of Idaho, via the Great Northern Railway Company and the said connecting railways then and there being engaged in interstate commerce by lines of railway in the States of Washington and Idaho, and the laws of the State of Idaho prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and the said intoxicating liquor not being transported, as aforesaid, for scientific, sacramental, medical and

mechanical purposes, and the Grand Jurors do further find and present that the said conspirators did on or about the 10th day of July, 1922, at Republic, in Ferry County, in the State of Washington and within the jurisdiction of this Court, renew and continue the said conspiracy, and that the aforesaid wilful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the first day of May, 1921, in Ferry County, within the State and Eastern District of Washington (the exact time being to the Grand Jurors unknown); that it was a part of the said scheme that the said conspiracy was to be a continuing one and it was continued in existence, operation and execution from about the first day of May, 1921, until the seventh day of August, 1922, and that at all times between the said dates the said defendants and the divers other persons to the Grand Jurors unknown, did continue to wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the acts hereinafter set forth in detail, and that in pursuance of the said unlawful and felonious conspiracy, combination and agreement and to effect the object of the same, the said conspirators did wilfully and unlawfully perform and do the following act:

That on or about the 10th day of July, 1922, at

Republic, in Ferry County, in the State and Eastern District of Washington and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully assist, aid and abet Joseph H. Frankel and Henry Dapper in transporting and causing to be transported in interstate commerce a quantity of intoxicating liquor, to wit: about fifteen (15) cases of Canadian whiskey to and into the town of Pocatello, in the State and District of Idaho, via the Great Northern Railway Company and connecting railways, said Great Northern and the said connecting railways then and there being engaged in interstate commerce by line of railway in the States of Washington and Idaho, and the laws of the State of Idaho prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and said intoxicating liquor not being transported, as aforesaid, for scientific, sacramental, medicinal and mechanical purposes, but was then and there fit for beverage purposes and contained more than one-half of one per centum of alcohol by volume, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

At the proper and appropriate time defendant LeRoy Powers, otherwise known as Roy Powers, did move the court for an order setting aside and quashing the indictment hereinbefore set forth on

the ground and for the reason that said indictment alleges separate, distinct, specific and disconnected offenses and did make an alternative motion that in the event said motion to quash the aforesaid motion be denied, that the court should enter an order requiring the plaintiffs to select as to whether the Government should proceed to try on Count I and II of said indictment or on Count III and IV of said indictment. Both of these motions were denied by the court and each of said rulings by the court were excepted by the plaintiff in error.

ASSIGNMENT OF ERRORS.

I.

That the court erred in refusing to quash the indictment in the above entitled cause as requested by Leroy Powers, otherwise known as Roy Powers, in his motion for an order setting aside and quashing the said indictment upon the grounds and reasons stated in said motion.

II.

That the court erred in not granting an order requiring the plaintiff to elect as to whether the Government should proceed to trial upon Counts one and two of said indictment or upon Counts three and four of said indictment, as requested by said defendant in his motion now on file herein.

III.

That the court erred in overruling said defendant's motion for judgment of acquittal, notwithstanding the verdict upon the grounds and for the reasons stated in said motion, which is now on file herein.

IV.

That the court erred in not granting said defendant's motion in arrest of judgment upon the grounds and reasons stated in said motion to which reference is hereby made.

V.

That the court erred in refusing to grant a new trial to said defendant upon the grounds and reasons stated in said motion.

ARGUMENT.

We shall discuss all assignments of error (one to five) together, the reason being that it is the contention of plaintiff in error that a new trial should have been granted by the court to the plaintiff in error because of error in law occurring at the trial and excepted to by said plaintiff in error, which error of law consisted in failing to either quash the indictment or in failing to grant an order requiring the Government to elect as to whether it would pro-

ceed to trial upon Counts I and II of said indictment or on Counts III and IV of said indictment.

Sec. 1024 Fed. Stat. Ann. (2nd Ed.) provides: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated." (Act of Feb. 26, 1853, Chap. 80, 10 Stat. L. 162.)

This is a case in which the charges arise out of an alleged conspiracy, first, to violate the National Prohibition Act and a conspiracy to violate the National Prohibition Act is charged in each of the counts numbered I and II of said indictment. Wrongfully and improperly joined with the two counts alleging the conspiracy to violate the National Prohibition Act are Counts III and IV of said indictment, which charge that the defendants did conspire to violate an Act of Congress of March 3, 1917, commonly known as the Reed "Bone Dry" Amendment. The principal question raised by this appeal is the question of whether or not there can be lawfully joined charges of a conspiracy to violate the National Pro-

hibition Act passed October 28, 1919, after its passage was made possible and constitutional by the 18th Amendment to the United States Constitution with a conspiracy to violate the Reed "Bone Dry" Amendment, otherwise known as the Act of Congress passed March 3, 1917, and being an Act of Congress which was consistent with the provisions of the United States Constitution prior to the passage of the 18th Amendment.

Obviously it cannot be seriously maintained that the several charges set forth in the various counts of the indictment are for the same act or transaction, because Counts I and II are explicitly charging a conspiracy to violate a law which could not exist until such time as the Constitution was amended, and Counts III and IV charge a conspiracy to violate a law which was passed by Congress in the exercise of its control over interstate commerce prior to the passage of the 18th Amendment.

The indictment nowhere alleges that the unlawful transaction complained of in Counts I, II, III and IV refer to the same act or transaction, or that they were acts or transactions connected together.

It has been held in *U. S. v. Scott*, 4 Biss. 29, 27 Fed. Cas. No. 16,241, that there cannot be a joinder of counts for conspiracy and murder, unless it appears upon the indictment that the counts refer to

“the same act or transaction,” or that they all are “acts or transactions connected together.”

The failure of the indictment to show on its face that the counts referred to the same act or transaction or that they were all acts or transactions connected together was reason for the court to have granted either defendant Powers’ motion to quash the indictment or his alternative motion to compel the Government to elect as to whether it would proceed to trial on Counts I and II or Counts III and IV of said indictment—unless it was shown that the acts or transactions complained of were of the class of crimes or offenses. So far as counsel for plaintiff in error are able to discover, the question of whether or not a conspiracy to violate a law which was constitutional before the passage of the 18th Amendment to the Constitution is the same class of crimes or offenses as is a conspiracy to violate a law which was made possible only by so drastic a step as an amendment to our National Constitution is a new one and as yet has not been decided by a court of appeals. In construing Sec. 1024, above cited, it was held in *Miller v. U. S.*, 38 App. Cas. (D. C.) 361, 40 L. R. A. (N. S.) 973 that the consolidation of indictments authorized by this section is only in cases where the offenses charged in the separate indictments might have been embraced in separate counts in one indictment.

It was held in *McElroy v. U. S.*, 164 U. S. 76, 41 U. S. (L. Ed.) 355, that where six persons were indicted for assault with intent to kill a certain person on April 16, 1894; also for assault with intent to kill another person on the same day; also for arson of the dwelling house of another person on May 1, 1894; and where three of the defendants were also indicted for the arson of the dwelling house of still another person on April 16, 1894, and the court ordered the four indictments consolidated for trial, that there was error in the order of consolidation, as the several charges in the four indictments were not against the same persons nor were they for the same act or transaction, nor for two or more acts or transactions connected together; they were substantive offenses separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence.

It was also held in *U. S. v. Cadwallader*, 59 Fed. 677, that where the defendant was charged with having at various dates embezzled, abstracted and wilfully misapplied the moneys and funds of the bank that in each of the counts there were also set out the particular facts constituting such embezzlement, abstraction, and wilful misapplication of the moneys, and a demurrer was interposed to the indictments for duplicity on the ground that they, and each of them,

charge three distinct charges under the statute, and that the demurrer should be, and the demurrer was sustained.

It is particularly important to bear in mind that though it may be wrongfully argued that all conspiracies are crimes of the same class, that such argument is sophistry.

The gist of the offense of conspiracy is not merely the agreement, but it is the agreement to do an act which is prohibited by law. Bearing in mind that there can be no statutory offenses of conspiracy to violate a law unless there be a law to be violated, it would logically follow that if laws had been violated, but not of the same nature or class, that counts charging such violations could not be properly joined under Sec. 1024.

Counsel for plaintiff in error believe that it would be conceded that a count charging a conspiracy to commit treason could not be properly joined with a count charging conspiracy to violate the Pure Food Laws, unless it appeared upon the face of the indictment that the counts referred to the same act or transaction and that they were all acts or transactions connected together. In this case there have been joined counts charging a conspiracy to violate the Reed "Bone Dry" Amendment, which was passed by Congress in 1917 in the exercise of its control

over interstate traffic with counts charging a conspiracy to violate the National Prohibition Law, which became effective and possible only by virtue of an amendment to the Constitution of the United States. In other words, Counts I and II of the indictment charge in effect that the defendant Powers, together with the other defendants, did agree to violate the National Prohibition Law, an act of such peculiar and unusual nature and so distinctive in its nature that it became necessary to amend the Constitution of the United States before Congress had power to pass the law which Counts I and II charge that the defendant Powers and other agreed to violate. With these Counts I and II were wrongfully joined with Counts III and IV, which charge that the defendant Powers and others did agree to violate a law known as the Reed "Bone Dry" Amendment which was passed by Congress prior to the 18th Amendment in the exercise of Congress' control over interstate commerce, a right which has long been conceded to Congress.

To counsel for plaintiff in error it appears that in the first two counts there were charged agreements to violate a separate and distinct law, and that the charge of conspiracy to violate the law can only be predicated upon agreements to violate laws, and that offenses which consist of agreements to

violate laws that are not of the same class are not offenses of the same class.

The counsel for plaintiff in error earnestly insist that the defendant Powers, having been tried on all four counts of the indictment, with the other defendants in the same cause, and having been found not guilty on three of said counts and guilty on one of said counts, was prejudiced by the refusal of the Honorable Trial Court to quash the indictment, because of the wrongful joinder of counts, or in failing to compel the Government to elect as to whether it would proceed to trial on Counts I and II or Counts III and IV of said indictment.

Respectfully submitted,

MUNTER & MUNTER,
POWELL & HERMAN,
Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For The Ninth Circuit

LEROY POWERS, (otherwise known as
ROY POWERS),
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 4047

Brief of Defendant in Error

*Upon Writ of Error to the United States District Court
for the Eastern District of Washington,
Northern Division.*

FRANK R. JEFFREY,
United States Attorney.

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United States
Circuit Court of Appeals
For The Ninth Circuit

LEROY POWERS, (otherwise known as ROY POWERS),	}	No. 4047
<i>Plaintiff in Error,</i>		
vs.		
THE UNITED STATES OF AMERICA,	}	
<i>Defendant in Error.</i>		

Brief of Defendant in Error

STATEMENT OF THE CASE.

The plaintiff in error was convicted under the Second Count of an indictment charging a conspiracy, with other defendants named therein, in violation of Section 37 of the Penal Code. The indictment, the sufficiency of which is not challenged, contained four counts. Each count is set forth in detail in the brief of the plaintiff in error, but for convenience in considering the same, the substance thereof is herein stated.

COUNT 1. Charges that the defendants conspired to commit acts made crimes by the National Prohibition Act by procuring and causing to be procured intoxicating liquor for the purpose of possessing, selling, bartering, exchanging, giving away and furnishing the

same; and that in furtherance and in pursuance of said conspiracy the defendants performed the following overt acts:

1. Concealed on July 26, 1922, twenty cases of intoxicating liquor.

2. Stole twenty cases of intoxicating liquor on July 27, 1922, from Joseph H. Frankel and Henry Dapper.

3. Possessed on July 27, 1922, twenty cases of intoxicating liquor.

COUNT II. Charges that the defendants conspired to commit acts made offenses by the National Prohibition Act by aiding, abetting and counselling certain persons engaged in the unlawful transportation of liquor, to transport intoxicating liquor from the Dominion of Canada into the United States, particularly into Ferry County, Washington; and that in furtherance of said conspiracy the said defendants performed the following overt acts:

1. Assisted, aided and abetted in the transportation of ten cases of intoxicating liquor from the Canadian boundary line to Republic, in Ferry County, Washington, on May 24, 1922.

2. Assisted, aided and abetted in the transportation of fifteen cases of intoxicating liquor from the Canadian boundary line to Republic, Ferry County, Washington, on July 10, 1922.

3. Assisted, aided and abetted in the transportation of twenty cases of intoxicating liquor from

the Canadian boundary line to Republic, Ferry County, Washington, on July 28, 1922.

COUNT III. Charges that the defendants conspired to commit acts made offenses by the Act of Congress of March 3, 1917, (39 Stats. 1069) known as the Reed "Bone Dry" Amendment, by aiding, abetting and counselling certain persons engaged in the unlawful transportation of liquor, to transport intoxicating liquor in interstate commerce from the State of Washington into other states; and in furtherance of said conspiracy said defendants performed the following overt act:

1. Assisted, aided and abetted Joseph H. Frankel in transporting and causing to be transported ten cases of intoxicating liquor known as Canadian whiskey from Republic, Ferry County, Washington, to Portland, Oregon, on May 25, 1922, via the Great Northern Railway Company and connecting railways.

COUNT IV. Charges that the defendants conspired to commit acts made crimes by the Act of Congress of March 3, 1917, (39 Stats. 1069) known as the Reed "Bone Dry" Amendment, by aiding, abetting and counselling certain persons engaged in the unlawful transportation of liquor to transport intoxicating liquor in interstate commerce from the State of Washington into other states; and in furtherance of said conspiracy the defendants performed the following overt act:

1. Assisted, aided and abetted Joseph H. Frankel and Henry Dapper on July 10, 1922, in transporting and causing to be transported in interstate commerce fifteen cases of intoxicating liquor from Republic, Ferry County, Washington, to Pocatello, Idaho, via the Great Northern Railway Company and connecting railways.

ASSIGNMENT OF ERRORS.

Five separate and distinct errors are assigned by the plaintiff in error, but the only question raised by such assignments of error is whether the indictment charges separate and distinct crimes which can not be joined as separate counts in one indictment. This question was raised by the plaintiff in error in the trial court, first: by motion to quash the indictment, or in the alternative, to require the Government to elect as to whether trial would proceed under Counts I and II or under Counts III and IV of the indictment; and, second: by a motion in arrest of judgment.

ARGUMENT.

It will be noted that Counts I and II each charge a conspiracy to commit acts made crimes by the National Prohibition Act and that Counts III and IV each charge a conspiracy to commit acts made crimes by the Reed "Bone Dry" Amendment. The plaintiff in error contends that conspiracies charging the commission of crimes, as defined in these two laws, can not be joined. The crime charged against the defendant in each count of the indictment is the crime of conspiracy, in

violation of Section 37 of the Penal Code, which reads as follows:

“Section 37. If two or more persons conspire either to commit an offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000 or imprisoned not more than two years, or both.”

Section 1024, Revised Statutes, provides for joining in one indictment in separate counts two or more acts or transactions connected together, or two or more acts or transactions of the same class of crimes or offenses. Section 1024, R. S., reads as follows:

“When there are several charges against any person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated.”

Can it be said that the several counts of this indictment does not charge “acts or transactions of the same class of crimes or offenses?” Can it be said that a conspiracy to commit acts made offenses by one act of Congress is a different class of crime than a conspiracy to commit an act offending some other act of Congress? Particularly so, where the conspiracies relate to offenses under acts of Congress covering similar subjects? In this case it will be noted that all the conspiracies involve transactions in intoxicating liquor.

The nature of the offense (a conspiracy) is certainly the same, the offense relates to the same subject matter, the same rules of evidence apply and the penalty imposed upon conviction must be the penalty provided under Section 37 of the Penal Code, regardless of the penalty which may be provided for by the act for the violation of which the conspiracy was formed.

Counsel for plaintiff in error apparently fail to observe that the conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. This has been repeatedly declared by the Supreme Court of the United States:

United States v. Rabinowich, 238 U. S. 78, 85;
Callan v. Wilson, 127 U. S. 540, 555;
Clune v. United States, 159 U. S. 590, 595;
Williamson v. United States, 207 U. S. 425, 447;

If this be true, then all conspiracies must be of the same class of offenses and the distinction between the various crimes that are the object of the conspiracies cease to exist. In discussing the provisions of Sec. 37 of the Penal Code, the Supreme Court in the case of *United States v. Hirsch*, 100 U. S. 33, states:

“The conspiracy here described is a conspiracy to commit any offense against United States. The fraud mentioned is any fraud against them. It may be against the coin, or consist in cheating the Government of its lands or other property. The offense may be treason and persons have been convicted under this statute for a conspiracy to do the acts which constitute treason against United States.”

In the case of *United States v. Britton*, 108 U. S. 199, 204, Mr. Justice Woods, speaking for the Court, said:

“The offense does not consist of both the conspiracy and the act done to effect the object of the conspiracy, *but of the conspiracy alone.*”

Again, in the case of *Dealy v. United States*, 152 U. S. 439, the Court declared:

“The gist of the offense is the conspiracy.”

Furthermore, a single conspiracy might have for its object the violation of two or more of the criminal laws, the substantive offenses having perhaps different periods or limitations. This fact is recognized by the Supreme Court in *United States v. Rabinowich*, 238 U. S. 78, 86 in which case the court cites *Joplin Mercantile Co. v. United States*, 236 U. S. 531, for an instance of a conspiracy with manifold objects.

It follows, therefore, that if the conspiracy was not a different offense from the crime that is the object of the conspiracy, then a conspiracy having for its object the commission of acts made crimes by different laws, could not be charged in one indictment, which the court has declared may be done.

The plaintiff in error cites the case of *McElroy v. United States*, 164 U. S. 76, as sustaining his position. The case has no application and can not be likened to the instant case. The reason for holding that the indictments could not be consolidated in the *McElroy* case is succinctly stated by the Supreme Court in the case of *Williams v. United States*, 168 U. S. 382, 390:

“The inquiry in that case, (*McElroy v. United States*), was ‘whether counts against five defendants can be coupled with a count against part of them, or offences charged to have been committed by all at one time can be joined with another and distinct offense committed by part of them at a different time.’ It was held that the statute did not authorize that to be done. The Chief Justice, speaking for the court, said: ‘It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried.’”

Again, the case of the *United States v. Cadwallar*, 59 Federal 677, is cited by counsel for plaintiff in error which case also has no application here. The indictment in that case was held bad for the reason that each count thereof charged three distinct crimes. The question of whether the counts had been properly placed in one indictment was not considered.

It is contended by counsel for plaintiff in error that the indictment in the case at bar does not show on its face that the counts refer to acts or transactions connected together. The evidence which showed that the conspiracy charged in Counts III and IV was a further conspiracy flowing out of and directly following the conspiracy charged in Counts I and II, is not before the Court. However, a perusal of the various counts will show that the various conspiracies charged are connected together and were part of the same transaction. Count II alleges as an overt act the assistance of the defendants in transporting ten cases of liquor from the Canadian boundary line to Republic, in Ferry

County, Washington, on May 24, 1922; and Count III alleges as an overt act the assistance of the defendants in causing the transportation in interstate commerce of ten cases of intoxicating liquor from Republic, in Ferry County, Washington, to Portland, Oregon, on May 25, 1922.

Again, Count II alleges as an overt act the assistance of the defendants in the transportation of fifteen cases of intoxicating liquor from the Canadian boundary line to Republic, in Ferry County, Washington, on July 10, 1922—and Count IV alleges as an overt act the assistance of the defendants in causing the transportation of fifteen cases of intoxicating liquor from Republic, in Ferry County, Washington, to Pocatello, Idaho, on July 10, 1922.

It clearly appears, therefore, that all of the same defendants are charged in Counts III and IV with a conspiracy to ship in interstate commerce the same quantity of liquor on the same date from the same place that they are charged in Count II with assisting in bringing to the place from which the interstate transportation commences. These facts make the case at bar quite analagous to the case of *Pointer v. United States*, 151 U. S. 396, in which the court held an indictment good which charged two separate and distinct murders committed on the same day, in the same county and district and with the same kind of instrument.

The court in the case of *Pointer v. United States*, just cited, emphatically announced the principle that

Sec. 1024 R. S. leaves to the discretion of the court the determination of whether in a given case a joinder of two or more offenses in one indictment against the same person is consistent with the settled principles of criminal law. In stating this principle, the court said:

“While recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defence by a multiplicity of charges embraced in one indictment and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial. The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor. That discretion has not been taken away by section 1024 of the Revised Statutes. On the contrary, that section is consistent with the settled rule that the court, in its discretion, may compel an election when it appears from the indictment, or from the evidence, that the prisoner may be embarrassed in his defence, if that course could not be pursued.”

In the instant case it certainly can not be said from the face of the indictment that the plaintiff in error was embarrassed in his defense by having Counts III and IV joined in the same indictment with Counts I and II. It is also evident that the trial court, exercising the discretion referred to in the case last cited, did not consider from the evidence that the plaintiff in error had been so embarrassed in his defense for the reason that the motion of the plaintiff in error for a directed verdict and his motion in arrest of judgment were both denied.

Furthermore, it does not appear from the decisions that it is essential for the indictment to show on its face that the transactions are connected together in order to prevent the court from requiring the Government to elect on which count or counts of an indictment it will proceed to trial where more than one offense is charged.

In *Pointer v. United States*, 151 U. S. 396, the court refers at page 402 to the case of *Regina v. Trueman*, 8 Car & P. 727, as follows:

“For instance, in *Regina v. Trueman*, 8 Car & P. 727, which was an indictment for arson, containing five separate counts, each charging the firing of a house of a different owner, it appeared from the opening by the prosecutor that the houses in question constituted a row of adjoining houses, and that the fire was communicated to four of them from the one first set on fire. As the burning of each house was a distinct felony, the prisoner asked that the prosecutor be put to his election. Erskine, J., said: ‘As it is all one transaction, we must hear the evidence, and I do

not see how, in the present stage of the proceedings, I can call on the prosecutor to elect. I shall take care that, as the case proceeds, the prisoner is not tried for more than one felony. The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and may, therefore, be likely to embarrass the prisoner in his defence'."

It is evident from the foregoing language of the court that the indictment in the case of Regina v. Trueman did not show upon its face that the various counts charging the crime of arson were connected together or part of the same transaction, but the trial court, upon the opening of the prosecution, determined that they were closely connected together and refused to require the Government to elect as between the several counts.

SUMMARY.

Counts I and II charge a conspiracy to commit offenses made crimes by the National Prohibition Act. Counts III and IV charge a conspiracy to commit offenses made crimes by the Reed "Bone Dry" Amendment. The gist of the crime in each count is the conspiracy. Each conspiracy is the same class of crime. The overt acts set forth in the various counts show by comparison that they were part of the same transaction and connected with each other in pursuance of the conspiracies charged. Such conspiracies may be joined under Sec. 1024 R. S. in one indictment in separate counts.

It is submitted, therefore, on behalf of the Government that no error was committed by the trial court in refusing to quash the indictment, or in refusing to require the Government to elect as to whether it would proceed to trial on Counts I and II or Counts III and IV of the indictment.

The judgment should be affirmed.

Respectfully submitted,

FRANK R. JEFFREY,
United States Attorney.

United States
Circuit Court of Appeals
For the Ninth Circuit.

FIDELITY & DEPOSIT COMPANY OF MARY-
LAND, a Corporation,
Plaintiff in Error,
vs.

JOHN P. DUKE, Supervisor of Banking of the
STATE OF WASHINGTON, Liquidating
the KELSO STATE BANK,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Western District of Washington,
Southern Division.

FILED
JUL 16 1923
F. D. MONTGOMERY
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

FIDELITY & DEPOSIT COMPANY OF MARY-
LAND, a Corporation,

Plaintiff in Error,

vs.

JOHN P. DUKE, Supervisor of Banking of the
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*Page-number appearing at foot of page of original certified Transcript of Record.

TRANSCRIPT ON REMOVAL.

From

Superior Court of Cowlitz County, State of
Washington,

to the

United States District Court for the Western Dis-
trict of Washington, Southern Division.

No. 3587.

T. H. ADAMS, as Special Deputy Supervisor of
Banking of the State of Washington, Liqui-
dating the KELSO STATE BANK, a Cor-
poration,

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY of MARY-
LAND,

Defendant. [2]

In the Superior Court of the State of Washington
in and for Cowlitz County.

3587.

No. 4740.

T. H. ADAMS, as Special Deputy Supervisor of
Banking of the State of Washington, Liqui-
dating the KELSO STATE BANK, a Cor-
poration,

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARY-
LAND, a Corporation,

Defendant.

Complaint.

Plaintiff for cause of action complains and alleges:

I.

That from the 14th day of April, 1913, to the 21st day of March, 1921, the Kelso State Bank was a corporation organized under the laws of the State of Washington and engaged in a general banking business at Kelso, Cowlitz County, Washington, and during all of said time F. L. Stewart of Kelso, Washington, was the cashier of the said Kelso State Bank.

II.

That the defendant the Fidelity & Deposit Company of Maryland is a corporation of the State of Maryland and is authorized to do business as a fidelity and guaranty company in the State of Washington.

III.

That on the 21st day of March, 1921, the Kelso State Bank became insolvent, unsound and in an unsafe condition to continue its business and was taken possession of by the Supervisor of Banking of Washington, and T. H. Adams was the regularly appointed Special Deputy Supervisor for the purpose of liquidating the affairs of the Bank and is now such officer in charge of the assets of the bank.

[3]

IV.

That on the 14th day of April, 1913, the defendant executed and delivered to the Kelso State Bank

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bond No. 886,520, for the sum of \$25,000.00, guaranteeing the Kelso State Bank for pecuniary loss of money, securities or other personal property sustained by any dishonest act or acts committed by the said F. L. Stewart as cashier of the Kelso State Bank, and such guarantee bond was accepted by the Kelso State Bank as a guarantee against loss sustained by the dishonest acts of the said F. L. Stewart, as such cashier.

V.

That thereafter, at the expiration of the guarantee bond mentioned and referred to, it was renewed and thereafter was annually renewed and continued in force until the 1st day of May, 1920; that on May 1st, 1920, Bond No. 886,520-A was issued to the Kelso State Bank for any fraud, dishonesty, forgery, theft, embezzlement or wrongful abstraction of F. L. Stewart while in the employ of the Kelso State Bank as such cashier, said bond covering a period of one year, to the 1st day of May, 1921.

VI.

That the bond No. 886,520 was on the regular form issued by the defendant and contained among others the following conditions:

WHEREAS, the "Employer" has delivered to the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation of the State of Maryland, hereinafter called the "Company," a certain statement in writing relative to the Employee, his conduct, duties, employment, and accounts, the manner of conducting the business of the Employer and other things connected with the issu-

ance of this bond, which, together with any other statements, in writing, hereafter made by the Employer to the Company relating to any such matters do and shall form part of this contract, or any continuation or continuations thereof, and shall be warranties, and it is hereby agreed, [4] that any such statements, made in writing by the President, Cashier, or any officer or director of the Employer shall be considered the statements of the Employer within the meaning hereof.

Now therefore, in consideration of the sum of Sixty-two and 50/100 (\$62.50) Dollars paid as a premium for the period from 5/1/13 to 5/1/14, at 12 o'clock noon, and of said warranties of said Employer as aforesaid,

IT IS HEREBY AGREED,

That subject to the obligations imposed on the Employer, by this bond and the warranties aforesaid which are part hereof, the performance of which shall be conditions precedent to the right on the part of the Employer to recover under this bond, the Company shall, at the expiration of three months next after proof of pecuniary loss, as hereinafter mentioned, has been given to the Company, reimburse the Employer to the extent of the sum of Twenty-five Thousand (\$25,000.00) Dollars, and no further for such pecuniary loss of moneys, securities or other personal property belonging to the Employer, as the Employer shall have sustained by any dishonest act or acts committed by the Employee in the performance of the duties of the office or position as the Employee may be subsequently

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appointed to or called upon to fill by the Employer, as such duties have been, or may hereafter be stated in writing by the Employer to the Company, and occurring during the continuance of this bond, and discovered at any time within six months after the expiration or cancellation of this bond, or in case of the death, resignation or removal of the Employee prior to the expiration or cancellation of the bond, within six months after such death, resignation or removal;

THIS BOND may be continued from year to year, at the option of the Employer, at the same or an agreed premium price, so long as the Company shall consent to receive the same; PROVIDED, that the liability of the Company as surety for the Employee to the Employer shall not exceed the amount above written, whether the loss shall occur during the term of the bond above named, or during any continuation or continuations thereof, or partly during the said term and partly during the said continuation or continuations.

THAT the Employer, on becoming aware of any act which may be made the basis of any claim hereunder, shall immediately give the Company notice thereof, in writing, by a registered letter, addressed to the President of the Company, Baltimore, Maryland, and shall, within ninety days after its so becoming aware of such acts as aforesaid, file with the Company its itemized claim hereunder at its own costs and expense, [5] with full particulars thereof duly sworn to; and, if required, the Employer shall, also produce in support thereof

for investigation by the Company, or its representative, at the office of the Employer, all appropriate books, vouchers and evidence as may be required by the Company; and this bond shall become void, both as to any existing, or future liabilities thereunder unless the aforesaid notice shall have been given as provided for, and unless claim is filed within the time and manner above specified, and until such books, vouchers and evidence (if required) have been furnished to the Company for investigation as above stated; . . . ”

That Policy No. 886,520-A was on the standard form of the Company and contained among others the following conditions:

“THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, hereinafter called the Surety, does hereby agree to indemnify Kelso State Bank of Kelso, Washington, hereinafter called the Employer, against the loss, not exceeding TWENTY FIVE THOUSAND DOLLARS (\$25,000.00), of any money or other personal property (including money or other personal property for which the Employer is responsible) through the fraud, dishonesty, forgery, theft, embezzlement, or wrongful abstraction of F. L. Stewart, hereinafter called the Employee, DIRECTLY or in connivance with others, while the Employee is engaged in the service of the Employer, while this bond is in force.”

VII.

That by reason of the dishonest acts of the said F. L. Stewart as cashier of the Kelso State Bank

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the bank suffered a pecuniary loss of moneys and securities during the year 1915, amounting to the sum of \$3,132.75; that the fraud and dishonesty of the said F. L. Stewart consisted in his wrongfully appropriating to his personal or individual account the sums above mentioned through giving and renewal of notes given by Wallace & Moser, said notes being as follows: one note for \$420.00 of date October 4th, 1915; one note for \$445.00 of which \$345.00 was appropriated by said F. L. Stewart, of date November 8th, 1915; one note for [6] \$1,972.75 of date November 18, 1915; one note for \$230, of which \$225.00 was appropriated, of date November 30, 1915, and one note for \$170.00 dated December 40, 1915;

That by reason of the dishonest and fraudulent acts of the said F. L. Stewart as cashier of the Kelso State Bank the bank suffered a pecuniary loss of moneys and securities during the year 1916, amounting to the sum of \$2,301.44; that the fraud and dishonesty of said F. L. Stewart consisted in his wrongfully appropriating to his personal or individual account the sums mentioned through the giving and renewal of notes given by Wallace & Moser and the Triumph Machinery Company, said notes being dated as follows: one note for \$472.00 of which \$41.44 was wrongfully appropriated, of date January 10, 1916; one note for \$500.00 dated January 12, 1916; one note dated February 14, 1916, for \$150.00; one note for \$150.00 dated March 6, 1916; one note for \$150.00 dated April 28, 1916; one note for \$260.00 dated May 5, 1916; one note

for \$150.00 dated August 12, 1916, all of said notes being signed by Wallace & Moser, and one note for \$800.00 dated November 17th, 1916, given by the Triumph Machinery Company;

That by reason of the dishonest and fraudulent acts of the said F. L. Stewart as cashier of the Kelso State Bank the bank suffered a pecuniary loss of money and securities during the year 1917 amounting to the sum of \$4,894.24; that the fraud and dishonesty of said F. L. Stewart consisted in his wrongfully appropriating to his personal or individual account the sums above mentioned through giving and renewal of notes. Said notes being dated as follows: one note for \$816.80 of date December 8th, 1917, signed [7] by the Triumph Machinery Company; one note for \$18,000, of which \$4,032.44 was appropriated by said F. L. Stewart, of date December 28, 1917, and signed by Max Johnson.

That by reason of the dishonest and fraudulent acts of the said F. L. Stewart as cashier of the Kelso State Bank the bank suffered a pecuniary loss of moneys and securities during the year 1918 amounting to the sum of \$6,152.90; that the fraud and dishonesty of said F. L. Stewart consisted in his wrongfully appropriating to his personal or individual account the sums above mentioned through giving and renewal of notes, said notes being dated as follows: notes signed by W. C. Slattery for \$1,500.00, of which \$1,000.00 was appropriated by said F. L. Stewart, of date September 26, 1918; one note signed by Geo. B. Smith

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for \$525.00 of date February 18, 1918; one note for \$194, of which \$67.90 was appropriated by said F. L. Stewart; of date March *March* 20, 1918, signed by H. D. Phillips; one note for \$1,500.00, *noe* note for \$15.00, one note for \$500.00, all signed by H. D. Phillips, of date March 20, 1918; one note for \$1,500.00 signed by H. D. Phillips, of date April 11, 1918, one note for \$255.00 signed by A. G. Wallace, dated January 30th, 1918, and one note for \$255.00 signed by A. J. Moser dated February 4th, 1918.

That by reason of the dishonest and fraudulent acts of the said F. L. Stewart as cashier of the Kelso State Bank the bank suffered a pecuniary loss of moneys and securities during the year 1919 amounting to the sum of \$1,531.74; that the fraud and dishonesty of said F. L. Stewart consisted in his wrongfully appropriating to his personal or individual account the sums above mentioned [8] through giving and renewal of notes, said notes being dated as follows:

One note given by J. W. Alexander for \$1,580.-00, of which \$26.35 was appropriated by said F. L. Stewart, of date June 4th, 1919; a note for \$1,600.00 signed by J. W. Alexander of date July 24, 1919, of which \$1,057.34 was appropriated by said F. L. Stewart; one note given by J. G. Edwards for \$409.35 of date December 26, 1919, and one note for \$600.00, of which \$38.70 was appropriated by said F. L. Stewart, signed by H. D. Phillips, dated April 5, 1919.

That by reason of the dishonest and fraudulent acts of the said F. L. Stewart as cashier of the Kelso State Bank the bank suffered a pecuniary loss of moneys and securities during the year 1920 amounting to the sum of \$24,063.40; that the fraud and dishonesty of the said F. L. Stewart consisted in his wrongfully appropriating to his personal or individual accounts the sums above mentioned through giving and renewal of notes, said notes being dated as follows: One note given by Howard S. Amon for \$2,000.00, of which \$1,000.00 was appropriated by said F. L. Stewart, dated August 19, 1920; one note given by Fritz Kruse of date July 1, 1920 for \$120.00 of which \$59.87 was appropriated by said F. L. Stewart; one note signed by Fritz Kruse dated September 10, 1920 for \$5,000.00 of which \$4,880.00 was appropriated by said F. L. Stewart; one note signed by Frank Shepard dated March 11, 1920, for \$589.40, one note signed by Northwest Transportation Company, dated April 3, 1920, for \$2,500.00; one note for \$1,000.00 dated April 23, 1920, signed by Frank Shepard; one note signed by [9] Frank Shepard of date July 19, 1920, for \$1,000.00; one note signed by Frank Shepard of date August 13, 1920, for \$1,000.00; one note signed by Frank Shepard of date August 13, 1920, for \$1,000.00; one note signed by Northwest Transportation Company of date September 1st, 1920, for \$5,000.00, of which \$2,104.78 was appropriated by F. L. Stewart; one note signed by Frank Shepard of date September 29, 1920, for \$1,000.00; one note signed by Northwest Transporta-

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tion Company of date November 17, 1920, for \$2,000.00 of which \$43.80 was appropriated by said F. L. Stewart; one note signed by A. Welch of date August 19, 1920, for \$6,000.00 of which \$1,000.00 was appropriated by said F. L. Stewart; one note signed by F. L. Stewart of date December 18, 1921, for \$6,000.00.

That by reason of the dishonesty and fraudulent acts of the said F. L. Stewart as cashier of the Kelso State Bank the bank suffered pecuniary loss of moneys and securities during the year 1921 amounting to the sum of \$12,363.50; that the fraud and dishonesty of the said F. L. Stewart consisted in his wrongfully appropriating to his personal or individual account the sums above mentioned through giving and renewal of notes, said notes being dated as follows: One note signed by Kelso Farm Company for \$2,200.00, of date January 12, 1921; one note signed by Kelso Farm Company for \$3,750.00 of date February 15, 1921; one note for \$6,250.00, dummy (Fisk) note of which \$5,000.00 was appropriated by the said F. L. Stewart, dated January 19, 1921; one note for \$2,000.00 signed by Northwest Transportation Company of which \$450.00 was appropriated by said F. L. Stewart, dated March 10, 1921; one note for \$1,250.00 signed by Northwest Transportation Company of which \$800.00 was appropriated by said F. L. Stewart, dated March 10, 1921, [10] and one note for \$163.50 signed by Wallace & Moser, of date March 10, 1921.

VIII.

That upon taking possession of the assets of the

insolvent bank the officers in charge under the laws of the State of Washington caused an examination to be made of the books of the bank and the fraud and dishonesty of the said F. L. Stewart was discovered and notice in writing was immediately given by the officer in charge liquidating the affairs of the bank, to the defendant, as required by the provisions of the bond, of the sums of money and securities wrongfully appropriated by the said F. L. Stewart, and within ninety days after becoming aware of the dishonest and fraudulent acts of the said F. L. Stewart the officer in charge of the bank furnished the defendant an itemized claim with full particulars thereof, duly sworn to, and the defendant was given full opportunity to investigate, and did investigate the books, vouchers and evidence of the bank showing the fraud, dishonesty and embezzlement of the said F. L. Stewart.

IX.

That since furnishing the itemized list of the claim of the bank the officer in charge has discovered that in addition to the defalcations and losses above set forth that the said F. L. Stewart, on the 4th day of April, 1917, took from the deposit box of Andrew Carlson a note of E. E. Zaring for \$550.00 and sold it to the bank, and took the proceeds for his personal benefit; that the bank was compelled to return said note and thereby suffered a loss of \$550.00; that on October 23, 1920, the said F. L. Stewart took from the files of the Estate of [11] Philip Richter, of which he was

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administrator, warrants numbered 1016, 1017, 1018 and 1019 of the par value of \$500.00 each, amounting to a total of \$2,000.00, and put them in the bank and took the money from the bank to his personal credit for that amount, the bank thereby losing the sum of \$2,000.00; that on August 23, 1920, the said F. L. Stewart received from A. Welch collection of \$2,000.00 to be collected and placed on the \$6,000.00 note of A. Welch then due the bank; that he took credit for \$1,000.00 personally, which he failed to account to the bank for, and appropriated to his own use, the bank thereby suffering a loss in the sum of \$1,000.00.

WHEREFORE plaintiff demands judgment against the defendant for the sum of Twenty-five Thousand (\$25,000.00) Dollars, and for interest on the sums embezzled and wrongfully appropriated by the said F. L. Stewart until the amount wrongfully appropriated equaled the amount of \$25,000, and thereafter interest on the sum of \$25,000.00, and for the costs and disbursements herein to be taxed.

MILLER, WILKINSON & MILLER,

Attorneys for Plaintiff.

State of Washington,
County of Clarke, —ss.

I, T. H. Adams, being first duly sworn, do say on oath that I am Special Deputy Supervisor of Banking of the State of Washington, liquidating the Kelso State Bank and the plaintiff in the foregoing action, and I have heard the foregoing complaint read, and that I know the contents

thereof, and that the matters and things therein set forth are true, as I verily believe.

T. H. ADAMS.

Subscribed and sworn to before me this 18th day of October, 1921.

[Notarial Seal]

A. L. MILLER,

Notary Public for Washington, Residing at Vancouver.

Filed Dec. 14, 1921. Hite Imus, Clerk. [12]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 7, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [13]

Stipulation Re Amendment of Complaint.

IT IS HEREBY STIPULATED between the attorneys for the respective parties in the above-entitled matter that John P. Duke, Supervisor of Banking of the State of Washington, may be substituted as party plaintiff in the above-entitled matter and that the amendment may be made by interlineation and that hereafter the action shall be prosecuted by John P. Duke, Supervisor of Banking of the State of Washington, and that T. H. Adams, Special Deputy Supervisor of Banking be eliminated, and that the complaint may be considered as amended accordingly without the necessity of filing a new complaint.

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Dated this 4th day of February, A. D. 1922.

MILLER, WILKINSON & MILLER,

Attorneys for Plaintiff.

GRINSTEAD & LAUBE,

Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 7, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [14]

Answer.

Comes now the above-named defendant, and for answer to plaintiff's complaint herein, admits, denies and alleges as follows:

I.

Answering paragraph one of said complaint, defendant admits that prior to the 17th day of March, 1921, the Kelso State Bank, was a corporation engaged in a general banking business at Kelso, Cowlitz County, Washington, and that during all of said times F. L. Stewart was the cashier of said bank, and in that behalf alleges that said Kelso State Bank was engaged in general banking business at all times since 1893 until said 17th day of March, 1921; and that said F. L. Stewart was the cashier of said bank at all times from June 15th, 1899, until the said 17th day of March, 1921. Denies each and every allegation not hereinbefore admitted.

II.

Admits the allegations of paragraph two of said complaint.

III.

Denies each and every allegation in paragraph three of said complaint, and in that behalf alleges that the Kelso State Bank ceased to do business and was taken possession of by Claude P. Hay, then Bank Commissioner of the State of Washington, on [15] the 17th day of March, 1921; that John P. Duke, as Supervisor of Banking of the State of Washington, succeeded Claude P. Hay as Bank Commissioner of the State of Washington on or about the 1st day of April, 1921, and that the said John P. Duke, as Supervisor of Banking, took possession of said Kelso State Bank on or about the 1st day of April, 1921, and ever since has been, and now is, in possession of the assets of said Kelso State Bank, and is the officer in charge of and liquidating and administering the assets of said Bank.

IV.

Answering paragraph four of said complaint, defendant admits that on or about the 28th day of April, 1921, it delivered to the Kelso State Bank Bond #886,520, which said bond was dated the 14th day of April, 1913; and admits that said bond was in the penal sum of Twenty-five Thousand Dollars (\$25,000), and alleges that the original bond so delivered to the said Kelso State Bank is now in the possession of plaintiff herein; and that the terms and conditions of said bond are as stated

therein, and not otherwise. Denies each and every allegation in paragraph four not hereinbefore expressly admitted.

V.

Answering paragraph five of said complaint, defendant admits that prior to the expiration of said bond #886520, namely: prior to the 1st day of May, 1914, said bond was continued for a period of one year; and admits that said bond was thereafter annually continued until the 1st day of May, 1920; and in that behalf, alleges that the execution of said bond and the continuations thereof were all made in reliance upon and in consideration of statements made by said Kelso State Bank to this defendant, which statements were warranties of the facts contained therein. Defendant further admits that on May 1st, 1920, Bond #886,520-A was issued to the Kelso State Bank by the defendant, which said bond was for a period [16] of one year from the date thereof; and alleges that the original of said bond is now in the possession of plaintiff herein, and that the terms and conditions of said bond are as stated therein, and not otherwise. Denies each and every allegation in said paragraph five not hereinbefore expressly admitted.

VI.

Answering paragraph six of said complaint, defendant admits that the bonds executed by defendant to plaintiff contained in part the provisions and conditions alleged in said paragraph six, and in that behalf alleges that said paragraph six does not set forth all of the provisions or conditions of

said bonds; that a true and correct copy of said Bond #886,520 is hereto attached, marked Exhibit "A," and made a part hereof; and that a true and correct copy of said Bond #886,520-A is hereto attached and marked Exhibit "B," and made a part hereof; and that the terms and conditions of said bonds are as therein stated, and not otherwise. Denies each and every allegation in paragraph six not hereinbefore expressly admitted.

VII.

Answering paragraph seven of said complaint, defendant denies each and every allegation in said paragraph seven contained.

VIII.

Answering paragraph eight of said complaint, defendant denies each and every allegation in said paragraph eight contained.

IX.

Answering paragraph nine of said complaint, defendant denies each and every allegation in said paragraph nine contained. [17]

Further answering said complaint, and for a first affirmative defense, defendant alleges:

I.

That the defendant now is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and that said defendant is now, and at all times herein mentioned has been, authorized to do, and doing, business as a surety company in the State of Washington, and that said defendant has

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paid its last annual license fee due to the said State of Washington as such corporation.

II.

That during the years 1911, 1912 and 1913, and for many years prior thereto, the American Bonding Company of Baltimore was a corporation organized and existing under and by virtue of the laws of the State of Washington, authorized to do, and doing, business in the State of Washington as a surety company.

III.

That on the 27th day of April, 1911, the Kelso State Bank executed and delivered to the American Bonding Company of Baltimore its written application to said Company to become surety on a bond for F. L. Stewart as cashier of said Kelso State Bank in the amount of Twenty-Five Thousand Dollars (\$25,000). That a copy of said application is hereto attached, marked Exhibit "C," and by this reference made a part hereof. That thereafter, in reliance upon the statements made in said application, and of the representations and warranties contained therein, the said American Bonding Company of Baltimore, as surety, on the 28th day of April, 1911, executed to the said Kelso State Bank its certain fidelity bond numbered 702,421-H. O.—407,274. That the original of said bond so executed by the said American Bonding Company of Baltimore is now in the possession of plaintiff herein, to which bond reference is hereby made for the terms and conditions thereof. That said bond so executed by the [18] said American

Bonding Company of Baltimore was for the term of one year, beginning on the 1st day of May, 1911, and said bond was thereafter by said American Bonding Company of Baltimore annually renewed and continued in force until the 1st day of May, 1913. That during the year 1913, defendant herein purchased all of the assets and assumed all of the liabilities of said American Bonding Company, and thereby became, and ever since has been, the successor of said American Bonding Company, of all of which said Kelso State Bank was duly notified prior to the execution of said bond #886,520, Exhibit "A" hereof, and prior to the execution of the application and certificate hereinafter mentioned (Exhibit "D" hereof). That on the 24th day of April, 1913, said Kelso State Bank made application to defendant herein for a bond dating from May 1st, 1913, for Twenty-Five Thousand Dollars (\$25,000) in favor of said Kelso State Bank as security to cover the said F. L. Stewart as cashier of said bank.

IV.

That in said application, the said Kelso State Bank expressly agreed that the information previously furnished by said Kelso State Bank to the American Bonding Company of Baltimore, Maryland, regarding said F. L. Stewart, his duties and employment, and the supervision exercised over the work and accounts of said employee shall be warranties and form a part of any bond executed by defendant to said Kelso State Bank covering said F. L. Stewart and of any continuations

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thereof that might be issued by the defendant to said Kelso State Bank in behalf of said employee. That a true and correct copy of said application and of said employer's certificate and agreement is hereto attached, marked Exhibit "D," and by this reference made a part hereof. That said Exhibit "D" and said Exhibit "C" are the statements in writing which said bond #886,520 (Exhibit "A" hereof) refers to as having been delivered to defendant prior to the execution of said bond, and said statements are by the express provisions of said bond made a part thereof, and are warranties, and said statements and the statements thereafter made [19] by said Kelso State Bank to defendant relative to said employee, his conduct, duties, employment and accounts are by the express provisions of said bond made a part thereof, and of any continuation or continuations thereof, and are warranties, the truth of which said warranties and the performance of which are expressly declared by said bond to be conditions precedent to the right on the part of said Kelso State Bank to recover under said bond.

V.

That in consideration of said application and of said employee's certificate and the agreements and warranties contained therein, defendant did on or about the 28th day of April, 1913, deliver to the said Kelso State Bank Bond #886,520, copy of which is hereto attached and marked Exhibit "A." That said bond was for the period from May 1st, 1913, to May 1st, 1914. That prior to the

expiration of said bond, namely, on the 23d day of April, 1914, the said Kelso State Bank made application to said defendant for a continuation of said bond for a period of one year from May 1st, 1914, to May 1st, 1915, and at the same time furnished defendant with a certificate to the effect that since the issuance of said bond, said F. L. Stewart had faithfully, honestly and punctually accounted to said Kelso State Bank for all money and property in his control or custody, as its employee; and that he has always proper security and funds on hand to balance his accounts, and that he was not on said date in default to said Bank; a copy of which certificate is hereto attached, marked Exhibit "E," and by this reference made a part hereof.

VI.

That on April 20th, 1915, April 29th, 1916, April 12th, 1917, April 15th, 1918, and April 28th, 1919, respectively, said Kelso State Bank made applications to the defendant for continuations of said bond; and that at each of aforesaid times certified that since the issuance of said bond, said F. L. Stewart [20] had faithfully, honestly and punctually accounted to said Kelso State Bank for all money and property in his control or custody, as its employee; and that he had always proper securities and funds on hand to balance his accounts, and that he was not on said dates in default to said Bank. That a true and correct copy of said certificate made on April 20th, 1915, is hereto attached, marked Exhibit "F," and made a part hereof.

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That a true and correct copy of said certificate made on April 29th, 1916, is hereto attached, marked Exhibit "G," and made a part hereof. That a true and correct copy of said certificate made on April 12th, 1917, is hereto attached, marked Exhibit "H," and made a part hereof. That a true and correct copy of said certificate dated April 15th, 1918, is hereto attached, marked Exhibit "I," and made a part hereof. That a true and correct copy of said certificate dated April 28th, 1919, is hereto attached, marked Exhibit "J," and made a part hereof.

VII.

That on April 26th, 1920, the said Kelso State Bank made application to said defendant for bond #886,520-A, and at said time executed and delivered to said defendant a certain certificate, a true copy of which is attached and marked Exhibit "K," and by this reference made a part hereof. That in reliance upon the statements, representations and warranties contained in said certificate and application dated April 26th, 1920, said defendant did on the 30th day of April, 1920, execute and deliver to said Kelso State Bank Bond numbered 886,520-A, a true and correct copy of which said bond is hereto attached, marked Exhibit "B."

VIII.

That said bonds hereinbefore mentioned, and the different continuations thereof, as hereinbefore stated, were each and all issued to the said Kelso State Bank in reliance upon the statements, repre-

sentations and warranties contained in the applications hereinbefore referred to, and in the certificates annually given by [21] said Kelso State Bank for the purpose of securing continuations of said bonds. That said bonds would not have been executed except for the representations, warranties and statements contained in said applications, and in said certificates for continuations.

IX.

That said Bond #886,520 for the period from May 1st, 1913, contained, among others, the following provision:

“That there shall be a complete inspection of the books of the Employee on behalf of the Employer at least once every twelve months from the date of this bond, such inspection to include inspection of all cash and securities of which the Employee shall have custody or charge,”

and contained the further provision:

“That whenever the Employer warrants by any of the statements made the basis of this bond or any continuation or continuations thereof, that the employee shall be required to do anything, any failure by the Employee to do such thing, to the knowledge of any officer or director of the Employer, whether in collusion with the employee or not, shall render this bond null and void as to any subsequent dishonest act or acts committed by the Employee, unless upon notice of such failure the Company shall waive the

same in writing, over the signature of one of its officers.”

X.

That if the said Kelso State Bank has suffered any loss by reason of the dishonest and fraudulent acts of said F. L. Stewart, which this defendant denies, said losses were caused by the failure of said Kelso State Bank to perform the conditions set out in said application, Exhibit “C” hereof, relative to said employee, his duties, employment and acts, the manner of conducting the business of the Employer, and other things connected with the issuance of said bond, which said application and the statements therein, together with the statements thereafter made by the Employer to the Company relating to said matters, which said statements were made for the purpose of securing continuations of said bond, were by the express provisions of said bond, warranties, and said losses, if any, which said bank suffered by reason of the dishonest or fraudulent acts of said F. L. Stewart were caused by the failure of said Kelso State [22] Bank to observe said warranties, and by the failure of said Kelso State Bank to comply with said statements and warranties relative to the examination of the cash and securities of said F. L. Stewart; and said continuations of said bond were, by the said Kelso State Bank, secured upon the representations that said F. L. Stewart had at all times prior to the date of said continuations respectively, faithfully, honestly and punctually accounted for all money and property in his control or custody, and that he had

always had proper securities and funds on hand to balance his accounts, and that he was not then in default to said Kelso State Bank.

XI.

That the alleged defalcations of said F. L. Stewart as appears by said complaint consisted of alleged dishonest and fraudulent acts of said F. L. Stewart, in said F. L. Stewart wrongfully appropriating to his personal and individual account certain sums of money during the years 1915, 1916, 1917, 1918, 1919, 1920 and 1921. That said alleged dishonest and fraudulent acts are stated in said complaint to consist of the giving and renewal of certain notes stated in said complaint during said years above mentioned, and this defendant alleges on information and belief that during all of said times said notes were in the possession of said Kelso State Bank, and were kept in the proper files of said bank and were at all times open to inspection by the officers of said bank, and that said bank and the officers thereof knew, during the years 1915, 1916, 1917, 1918, 1919, 1920 and 1921, of said notes, and had access to same; and if there was any fraud or dishonesty in connection with the taking of said notes or the renewal of the same, said fraud or dishonesty would have been discovered by said bank and by said officers of said bank, had said officers complied with the warranties and representations contained in the applications hereinbefore mentioned, and in the statements contained in the certificates hereinbefore mentioned. [23]

Further answering said complaint, and by way

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of a second affirmative defense thereto, this defendant alleges:

I.

Repeats and incorporates herein paragraphs one, two, three, four, five, six, seven and eight of the first affirmative defense hereinbefore set out.

II.

That if the allegations of said complaint are true, said Kelso State Bank, in procuring the continuations of said bond annually as hereinbefore stated, and in making the statements and representations set out in said certificates given for the purpose of securing continuations of said bond, was guilty of misrepresentation and fraud, and falsely and fraudulently represented to said defendant, for the purpose of securing said continuations, that said F. L. Stewart had at all times faithfully, honestly and punctually accounted to said Kelso State Bank for all money and property in his custody or under his control, and had always proper security and funds on hand to balance his accounts, and that he was not at the time of giving said certificates in default to said Kelso State Bank. That said statements and representations were prejudicial to this defendant, and said defendant would not have executed said bonds or continued the same except for the same, and relied thereon, and believed the same, in executing said bonds and said continuations.

Further answering said complaint, and by way of a third affirmative defense thereto, defendant alleges:

I.

Repeats and incorporates herein paragraphs one, two, three, four, five, six, seven and eight of its first affirmative defense hereinbefore set out.

II.

That in violation of the warranties and conditions precedent contained in said application, and in said bonds, [24] said Kelso State Bank, without previous notice to or the consent of this defendant, continued said F. L. Stewart in its employment after it had become aware of acts which might have been made the basis of claims under said bond, in that said F. L. Stewart had at various times during the period covered by said bond, borrowed from said Kelso State Bank certain moneys on his own personal note and on notes signed by the Kelso Farm Company, which was a trade name under which said F. L. Stewart was doing business, without having, prior to the borrowing of said money, secured the consent of the Board of Directors of said Kelso State Bank to the making of said loans; and that said Kelso State Bank and the officers and directors thereof knew of said transactions and allowed and permitted said F. L. Stewart to repeatedly borrow money from said Kelso State Bank on his personal notes and on notes signed by said Kelso Farm Company, and allowed said F. L. Stewart to settle said claims with said bank by paying said notes, all in violation of law and of the terms of said bonds; and in no case gave notice to this defendant or obtained the consent of said defendant to the settling of said claims,

or to the continuing of said F. L. Stewart in the employment of said bank.

Further answering said complaint, and by way of a fourth affirmative defense thereto, this defendant alleges:

I.

That in violation of the terms of said bond #886,520, said F. L. Stewart engaged in speculation on various occasions to the knowledge of the officers of said bank, and to the knowledge of said Kelso State Bank, and by reason of such speculation became in embarrassed financial circumstances within the knowledge of said officers and within the knowledge of said bank, and that said officers failed and neglected to notify this defendant at once on becoming aware of said F. L. Stewart being engaged in said speculation, all in violation of said bonds, and especially in violation of the terms of said bond #886,520. That said speculation consisted in part [25] of the said F. L. Stewart engaging in various large lumber transactions, and in buying up timber claims and lumber in large and extensive amounts, and engaging in and purchasing all of the stock of the Kelso Farm Company, a corporation, and engaging in various real estate transactions in the State of Washington and in the State of Oregon, and in financing certain transportation companies, all of which ventures were of a speculative nature, and all of which ventures proved disastrous from a financial standpoint to the said F. L. Stewart; that said speculative enterprises were engaged in by said F. L. Stewart at various times and almost con-

tinuously during a period of approximately six years prior to the 17th day of March, 1921. That the said failure to give said notice was prejudicial to this defendant in that if this defendant had been notified of said speculations, it would have cancelled said bond and been relieved from further liability.

Further answering said complaint and as a fifth affirmative defense thereto, defendant alleges:

I.

Repeats and incorporates herein paragraphs one, two, three, four, five, six, seven and eight of defendant's first affirmative defense hereinbefore set out.

II.

That said bond #886,520, Exhibit "A" hereof, expressly provided:

"That if, without previous notice to and consent of the Company thereto, in writing, the Employer shall continue the Employee in its employment after having become aware of any act which may be made the basis of any claim hereunder, or make any settlement with the Employee for any loss hereunder, or do any act whereby the liability of the Employee to the Employer is changed in any material respect, this bond shall be null and void, both as to any existing or any future liability hereunder; and any wilful misstatement or suppression of facts in any claims made hereunder, shall render this bond void from the beginning,"

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and said bond #886,520-A, Exhibit "B" hereof, expressly provided as [26] follows:

"If the Employer shall sustain any loss that might be made the basis of a claim hereunder, and shall settle or compromise such loss with the Employee without first securing the consent of the Surety to such settlement or compromise, this bond shall thereupon become void from the beginning."

III.

That prior to the 26th day of May, 1919, the Kelso State Bank had become aware of all of the transactions relative to the notes given and renewed by the said F. L. Stewart as cashier of said Kelso State Bank prior to said time, which said transactions are the same transactions and which notes are the same notes set out and referred to in plaintiff's complaint herein, being all of the transactions and all of the notes mentioned and referred to in said complaint as taking place or being given or renewed prior to said 26th day of May, 1919; and said Kelso State Bank, with full knowledge of the facts, on said 26th day of May, 1919, made settlement with the said F. L. Stewart for all losses which said bank had suffered, or might suffer, by reason of the giving and renewal of said notes by said F. L. Stewart; and in said settlement required said F. L. Stewart to give said bank a written guarantee that he, the said F. L. Stewart, would save said bank harmless from all loss which it had suffered, or might suffer, by reason of the giving and renewal of said notes; and said F. L. Stewart

did, in compliance with said request of said Kelso State Bank, and in full settlement of all claims which said bank had, or might have, against said F. L. Stewart by reason of the giving or renewal of said notes, give said Kelso State Bank his written guarantee in words and figures, as follows:

“GUARANTEE.

Kelso, Washington, May 26th, 1919.

I HEREBY GUARANTEE the notes and mortgages held by the Kelso State Bank, both as to principal and interest, up to a sum not to exceed \$50,000.00, according to my proposition made to the Directors of said Kelso [27] State Bank, at its meeting held in the office of the bank on May 26th, 1919; this being done for the reason that these notes and mortgages have largely been accepted by the bank on my personal judgment in collecting in and making good old loans carried in former years; it being my judgment that these loans can all be collected in full, with principal and interest, by taking more time.

Signed and dated at Kelso, Washington, this 26th day of May, 1919.

(Signed) F. L. STEWART.”

That said settlement was made by said Kelso State Bank with said F. L. Stewart without giving previous notice to this defendant, and without the knowledge or consent of this defendant, and said Kelso State Bank, after the making of said settlement, and after becoming aware of the acts of the said F. L. Stewart as aforesaid, continued said F. L. Stewart in its employment without the con-

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sent of this defendant, and without giving notice to this defendant, and without the knowledge of this defendant; and by reason thereof and by reason of said settlement as aforesaid, said bond numbered #886,520 became null and void, both as to existing and future liability, and became void from the beginning.

Further answering said complaint, and as a partial defense thereto, defendant alleges:

I.

Repeats and incorporates herein paragraphs one, two, three, four, five, six, seven and eight of defendant's first affirmative defense hereinbefore set out.

II.

That said bond #886,520, Exhibit "A" hereof, contained the following provisions:

"That if the Employer shall at any time hold concurrently with this bond, or represent to the Company in any statement made to it, that it does or will at any time hold concurrently with this bond, any other bond or guarantee of security from or on behalf of the Employee, the Employer shall be entitled, in the event of loss as hereinbefore stated, to claim hereunder only such portion [28] of the loss as the amount covered by this bond bears to the whole amount of security carried, or so stated as carried, or to be carried, on the Employee's behalf, whether the Employer shall be able to reimburse itself from such bond or guaranty so carried, or stated to be carried, or not, or

whether the same has been allowed to lapse or not."

III.

That said Kelso State Bank did hold concurrently with said bond, and did hold at all times on and after the 26th day of May, 1919, a written guarantee of security from said Employee, which said guarantee was and is in words and figures, as follows:

"GUARANTEE.

Kelso, Washington, May 26th, 1919.

I HEREBY GUARANTEE the notes and mortgages held by the Kelso State Bank, both as to principal and interest, up to a sum not to exceed \$50,000.00, according to my proposition made to the Directors of the Kelso State Bank at its meeting held in the office of the bank on May 26th, 1919; this being done for the reason that these notes and mortgages have largely been accepted by the bank on my personal judgment in collecting in and making good old loans carried in former years; it being my judgment that these loans can all be collected in full, with principal and interest, by taking more time.

Signed and dated at Kelso, Washington, this 26th day of May, 1919.

(Signed) F. L. STEWART."

That the notes referred to in said guarantee were, and are, the same notes mentioned and referred to in plaintiff's complaint herein, and by reason of the holding of said guarantee concurrently with said bonds, said plaintiff is not en-

titled to recover from this defendant on account of any losses which it may have suffered by reason of any dishonest act or acts of the said F. L. Stewart in connection with the giving or renewal of said notes or the transactions connected therewith, except such proportion of such loss as the amount covered by the bonds of this defendant bears to the whole amount of the security carried by said Kelso State Bank. [29]

Further answering said complaint, defendant alleges:

I.

That the defendant is now, and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to do, and doing, business as a surety company in the State of Washington, and that it has paid its last annual license fee due said State of Washington as such corporation.

II.

That the Kelso State Bank is now, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Washington, and said bank was at all times herein mentioned prior to the 17th day of March, 1921, carrying on a general banking business in the town of Kelso, Cowlitz County, Washington.

III.

That more than one year previous to the 17th day

of March, 1921, this defendant as surety, and the Kelso State Bank as principal, executed to Linus Perry Brown, as County Treasurer of Cowlitz County, two certain depository bonds in the amounts of Forty Thousand Dollars (\$40,000) and Ten Thousand Dollars (\$10,000), respectively, which said bonds were conditioned to guarantee deposits made by the said Linus Perry Brown as County Treasurer of Cowlitz County in said Kelso State Bank.

IV.

That from time to time said Linus Perry Brown deposited in said Kelso State Bank money belonging to Cowlitz County, which said Linus Perry Brown, as County Treasurer, had in his possession.

V.

That on the 17th day of March, 1921, the said Kelso State Bank, being insolvent, closed its doors and was taken [30] over by one Claude P. Hay, then Bank Commissioner of the State of Washington, for the purpose of liquidation and administration. That at said time, said Linus Perry Brown had on deposit in said Kelso State Bank money belonging to said Cowlitz County in the sum of Sixty-Four Thousand Four Hundred and Sixty Dollars and Ninety-Six Cents (\$64,460.96).

VI.

That in addition to said bonds hereinbefore mentioned, which had been executed by this defendant to guarantee said deposits, said Linus Perry Brown had one bond theretofore executed by the Maryland Casualty Company, a corporation, in the sum of

Twenty Thousand Dollars (\$20,000), and this defendant and said Maryland Casualty Company were obliged to pay, and did pay, said Linus Perry Brown, as County Treasurer, the entire amount which he had on deposit in said bank, namely, the sum of Sixty-Four Thousand Four Hundred and Sixty Dollars and Ninety-Six Cents (\$64,460.96). That this defendant's portion of said amount, together with interest, was Forty-six Thousand One Hundred and Sixty-three Dollars and Twenty-nine Cents (\$46,163.29), which said amount said defendant paid said Linus Perry Brown, as said treasurer of Cowlitz County, prior to the 25th day of April, 1921. That upon paying said sum to said Linus Perry Brown as aforesaid, on account of said bond, said defendant became subrogated to all claims, demands, actions and causes of action which said Linus Perry Brown, as such County treasurer, or said Cowlitz County, the owner of said funds, had against said Kelso State Bank by reason of having said money on deposit in said bank, as aforesaid. That said right of subrogation related back to the time when this defendant executed said bonds to said Linus Perry Brown, and related back to a time prior to the time when the Kelso State Bank closed its doors and was taken over by the said Claude P. Hay, then Bank Commissioner of the State of Washington. [31]

VII.

That on or about the 1st day of April, 1921, the plaintiff herein, John P. Duke, was appointed

Supervisor of Banking of the State of Washington, and duly qualified as such Supervisor of Banking, and ever since has been, and now is, the duly appointed, qualified and acting Supervisor of Banking of the State of Washington; and said John P. Duke as such Supervisor of Banking, succeeded to the rights and duties of the said Claude P. Hay as Bank Commissioner of the State of Washington, and on or about the 1st day of April, 1921, succeeded the said Claude P. Hay in the liquidation and administration of said Kelso State Bank, and ever since has been, and now is, in possession of and control of the assets of said Kelso State Bank.

VIII.

That on or about the 25th day of April, 1921, this defendant filed its claims with said Supervisor of Banking on account of having paid said Linus Perry Brown, as aforesaid, said sum of Forty-Six Thousand One Hundred and Sixty-three Dollars and Twenty-nine Cents (\$46,163.29), which said claim was thereafter on the 25th day of April, 1921, approved by said Supervisor of Banking, and allowed, but neither the same nor any part thereof has been paid.

IX.

That by reason of the premises, said defendant is entitled to recover from plaintiff herein and is a *bona fide* claimant against said bank in said sum of Forty-Six Thousand One Hundred and Sixty-Three Dollars and Twenty-Nine Cents (\$46,163.29).

X.

That prior to the commencement of this action, to wit, on the 9th day of September, 1921, the plaintiff herein, as complainant, commenced an action in the District Court of the United States for the District of Oregon on the Equity side of said court, which said action is numbered E-8573 of said court, and thereafter [32] and prior to the commencement of this action, to wit, on the 26th day of September, 1921, the plaintiff herein filed an Amended Bill of Complaint in said action in said United States District Court for the District of Oregon, in which amended bill of complaint the defendant herein and the Maryland Casualty Company, a corporation, are complainants therein, and the United States National Bank of Portland (Oregon), a corporation, and the Kelso State Bank, an insolvent banking corporation, and John P. Duke, as Supervisor of Banking of the State of Washington in charge of and liquidating the assets of said Kelso State Bank, are defendants therein. That in the said action, this defendant and the Maryland Casualty Company, a corporation, as complainants, are seeking to have their respective claims against said Kelso State Bank, by reason of having paid the bonds of Linus Perry Brown, as county treasurer of Cowlitz County, declared preferred claims against the plaintiff herein, and against said Kelso State Bank, and are seeking to have in said action certain warrants of the total face value of Thirty-three Thousand Four Hun-

dred and Ninety-one Dollars and Fifty-nine Cents (\$33,491.59) turned over to said complainants, for the reason as alleged in said bill of complaint, that said warrants were purchased with moneys deposited by said Linus Perry Brown, as county treasurer of Cowlitz County, in said Kelso State Bank when said Kelso State Bank was hopelessly insolvent within the knowledge of the officers of said bank; and for the further reason as alleged in said bill of complaint, that said warrants were on the 14th day of March, 1921, deposited with the United States National Bank of Portland (Oregon), one of the defendants in said action, as trustee, by said Kelso State Bank, for the use and benefit of said Linus Perry Brown as county treasurer of Cowlitz County, to secure the deposits of county funds which said Linus Perry Brown had in said Kelso State Bank.

XI.

That if complainants in said action are [33] successful in recovering said warrants of the total face value of Thirty-three Thousand Four Hundred and Ninety-one Dollars and Fifty-nine Cents (\$33,491.59), the claim of this defendant against plaintiff herein, as hereinbefore set out, will be reduced in the amount of five-sevenths ($\frac{5}{7}$) of the value of said warrants so recovered. That it is impossible at this time to determine whether or not the complainants in said action will be successful; and, if successful, it is impossible to determine what

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amount this defendant will be able to realize from its five-sevenths ($5/7$) of the value of said warrants.

XII.

That in said action said complainants are further seeking to have the deposits which said county treasurer made in said Kelso State Bank at the time when said bank was insolvent, declared Trust funds, and to have the Court decree that said funds may be followed into the hands of John P. Duke as Supervisor of Banking of the State of Washington, the plaintiff herein, and that the sum of Seventeen Thousand Six Hundred and Forty-one Dollars and Sixty-four Cents (\$17,641.64), which is the amount of cash which passed into the hands of said Supervisor of Banking, be declared to be the property of this defendant and said Maryland Casualty Company, as successors in interest of said county treasurer by reason of having been obliged to pay, and having paid, said county treasurer on account of said bonds the amount which said county treasurer had on deposit in the Kelso State Bank at the time it closed, as aforesaid. That it is impossible to determine at this time what amount, if any, complainants in said action will be entitled to recover by reason of the facts hereinbefore stated relative to said cash on hand in said Kelso State Bank at the time it closed. That if any recovery is made by reason thereof, this defendant will be entitled to receive five-sevenths ($5/7$) of the amount so recovered, and its claims against plaintiff herein will be reduced in a like amount. It is [34] also im-

possible at this time to determine whether or not this defendant in said action will be entitled to have its claim against plaintiff herein declared a preferred claim to be first paid out of the assets of said Kelso State Bank.

XIII.

That the plaintiff in this action has appeared as one of the defendants in said action in the District Court of the United States for the District of Oregon, and has filed and served its answer therein, and said action in said District Court of the United States for the District of Oregon is now at issue and is still pending in said court, and the same has been set for trial in said court on the 28th day of March, 1922.

XIX.

That in the event complainants in said action now pending in said United States District Court for the District of Oregon obtain said warrants, or any of them, or are successful in having any of said warrants applied to the payment of their claim against said Kelso State Bank and said John P. Duke as Supervisor of Banking of the State of Washington, or are successful in obtaining any of the other relief prayed for in their complaint therein, the amount of this defendant's claim against plaintiff herein will be reduced to the extent of five-sevenths ($\frac{5}{7}$) of such assets as may be obtained in said action now pending in said Federal Court; and this defendant desires to plead and prove in this action, by way of setoff, such amount of its claim against said plaintiff as shall not be satisfied as a result of

said action now pending in said District Court of the United States for the District of Oregon.

XX.

That the amount of such setoff cannot be determined at this time, and in order that the same may be capable of determination at the time of the trial of this case, this defendant prays that this action may be held in abeyance until final [35] judgment has been made and entered in said case now pending in said United States District Court of the District of Oregon, and that upon the determination of said action, this defendant may be permitted to plead herein by way of setoff, the amount which said plaintiff will at the time of the trial of case still owe this defendant; and that upon the trial of this action this defendant be permitted to set off against any judgment which plaintiff might otherwise be entitled to recover against this defendant, such amount as said plaintiff may at said time owe this defendant, and that said setoff be without prejudice to the rights of this defendant to recover any balance, which said plaintiff may owe this defendant over and above the amount of said setoff, in the ordinary course of administration of said bank.

WHEREFORE, defendant prays judgment as follows:

I.

That plaintiff take nothing herein, and that the complaint herein be dismissed.

II.

That this action be held in abeyance until the de-

termination of the action now pending in the District Court of the United States for the District of Oregon.

III.

That after the determination of the action now pending in the District Court of the United States for the District of Oregon, this defendant be allowed and permitted to file herein an amended answer, setting up the amount which plaintiff herein still owes this defendant, so that the same may be set off against any judgment which plaintiff herein would otherwise be entitled to recover from this defendant. [36]

IV.

For defendant's costs and disbursements herein expended, as provided by law.

GRINSTEAD & LAUBE,
Attorneys for Defendant. [37]

Exhibit "A."

(COPY)

BOND No. 886520.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.

Home Office, Baltimore, Md.

Amount, \$25,000.00. Annual Premium, \$62.50.

WHEREAS, F. L. Stewart, Kelso, Washington, hereinafter called the "Employee," has been appointed to the position of Cashier in the service of Kelso State Bank, Kelso, Washington, hereinafter called the "Employer"; And

WHEREAS, the "Employer" has delivered to the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation of the State of Maryland, hereinafter called the "Company," certain statements in writing relative to the Employee, his conduct, duties, employment and accounts, the manner of conducting the business of the Employer and other things connected with the issuance of this bond, which, together with any other statements in writing, hereafter made by the Employer to the Company relating to any such matters do and shall form part of this contract, or any continuation or continuations thereof, and shall be warranties, and it is hereby agreed, that any such statements, made in writing by the President, Cashier, or any officer or director of the Employer shall be considered the statements of the Employer within the meaning hereof;

NOW THEREFORE, IN CONSIDERATION of the sum of Sixty-two and 50/100 (\$62.50) Dollars, paid as a premium for the period from 5/1/13 to 5/1/14 at 12 o'clock noon, and of said warranties of said Employer as aforesaid, IT IS HEREBY AGREED that subject to the obligations imposed on the Employer, by this bond and the warranties aforesaid which are part hereof, the performance of which shall be conditions precedent to the right on the part of the Employer to recover under this bond, the COMPANY shall, at the expiration of three months next after proof of a pecuniary loss, as hereinafter mentioned, has been given to the Company, reimburse the Employer to the extent of the

sum of Twenty-five Thousand (\$25,000.00) Dollars, and no further for such pecuniary loss of moneys, securities or other personal property belonging to the Employer, as the Employer shall have sustained by any dishonest act or acts committed by the Employee in the performance of the duties of the office or position in the service of the Employer hereinbefore referred to, or of such other office or position as the Employee may be subsequently appointed to or called upon to fill by the Employer, as such duties have been, or may hereafter be stated in writing by the Employer to the Company, and occurring during the continuance of this bond, and discovered at any time within six months after the expiration or cancellation of this bond, or in case of the death, resignation or removal of the Employee prior to the expiration or cancellation of the bond, within six months after such death, resignation or removal;

THIS BOND may be continued from year to year, at the option of the Employer, at the same or an agreed premium rate, so long as the Company shall consent to receive the same; PROVIDED, that the liability of the Company as surety for the Employee to the Employer shall not exceed the amount above written, whether the loss shall occur during the term of the bond above named, or during any continuation or continuations thereof, or partly during the said term and partly during the said continuation or continuations.

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THIS BOND is issued and continued upon and subject to the following additional conditions and provisions:

THAT the actual payment of the premium and its acceptance by the Company, for either the issue or continuance of this bond, is essential to the validity of this bond or any continuation thereof, and a condition precedent to any right to claim hereunder;

THAT the Employer, on becoming aware of any act which may be made the basis of any claim hereunder, shall immediately give the Company notice thereof, in writing, by a registered letter, addressed to the President of the Company, Baltimore, Maryland, and shall, within ninety days after its so becoming aware of such act as aforesaid, file with the Company its itemized claim hereunder at its own cost and expense, with full particulars thereof duly sworn to; and, if required, the Employer shall also produce in support thereof for investigation by the Company, or its representative, at the office of the Employer, all appropriate books, vouchers

Exhibit "A," page 1. [38]

Exhibit "A," page 2.

and evidence as may be required by the Company; and this bond shall become void, both as to any existing, or future liabilities thereunder unless the aforesaid notice shall have been given as provided for, and unless claim is filed within the time and manner above specified, and until such books, vouchers and evidence (if required) have been furnished to the Company for investigation as

above stated; PROVIDED that no claim shall be payable hereunder that shall be filed with the Company after the period of six months from the expiration or cancellation of this bond, or after a period of six months from the death, resignation or removal of the Employee, occurring prior to the expiration or cancellation of this bond. PROVIDED FURTHER, that there shall be no liability on this bond for any dishonest act or acts committed by the Employee after the Employers first becoming aware of any act which may be made the basis of a claim hereunder.

THAT upon notification to the Company of any loss hereunder, the Company's liability shall thereupon terminate as regards any subsequent act of the Employee;

THAT if, without previous notice to and consent of the Company thereto, in writing, the Employer shall continue the Employee in its employment, after having become aware of any act which may be made the basis of any claim hereunder, or make any settlement with the Employee for any loss hereunder, or do any act whereby the liability of the Employee to the Employer is changed in any material respect, this bond shall be null and void, both as to any existing or future liabilities hereunder, and any willful misstatement or suppression of facts in any claim made hereunder shall render this bond void from the beginning.

THAT there shall be a complete inspection of the accounts and books of the Employee on behalf of the Employer at least once in every twelve months

from the date of this bond, such inspection to include examination of all cash and securities of which the Employee shall have custody or charge;

THAT the Employer shall at once notify the Company on becoming aware of the Employee being engaged in speculation or gambling or indulging in any disreputable or unlawful habits or pursuits;

THAT if the Employer shall at any time hold concurrently with this bond, or represent to the Company in any statement to it, that it does or will at any time hold concurrently with this bond, any other bond or guarantee of security from or on behalf of the Employee, the Employer shall be entitled, in the event of loss as hereinbefore stated, to claim hereunder only such proportion of the loss as the amount covered by this bond bears to the whole amount of security carried, or so stated as carried or to be carried on the Employee's behalf, whether the Employer shall be able to reimburse itself from such other bond or guarantee so carried or stated to be carried, or not, or whether the same has been allowed to lapse or not;

THAT if the Company shall so elect, this bond may be cancelled at any time by giving thirty days' notice in writing, to the Employer, and this bond shall be deemed cancelled at the expiration of the said thirty days, the Company remaining liable for all or any act covered by this bond which may have been committed by the said Employee up to the date of said cancellation under the terms, conditions and provisions of this bond, and the Company shall,

upon the surrender of this bond, and its release from all liability thereunder, refund the premium paid, less a *pro rata* part thereof for the time this bond shall have been in force;

THAT whenever the Employer warrants by any of the statements made the basis of this bond or any continuation or continuations thereof, that the Employee shall be required to do anything, any failure by the Employee to do such thing, to the knowledge of any officer or director of the Employer, whether in collusion with the Employee or not, shall render this bond or any continuation or continuations thereof null and void as to any subsequent dishonest act or acts committed by the Employee, unless upon notice of such failure the Company shall waive the same in writing over the signature of one of its officers;

THAT no proceeding at law or in equity shall be brought to recover any claim under this bond, unless the same is commenced and the process served upon the Company within a period of twelve calendar months next after the Employer first becoming aware of any act which may be made the basis of a claim hereunder;

THAT the Company, upon the execution of this bond, shall not thereafter be liable to the Employer under any bond previously issued to the Employer on behalf of said Employee in any employment under said Employer, the acceptance of this bond being a release to the Company of any possible liability under such prior bond, and upon the issuance of any bond subsequent hereto upon said

Employee in favor of said Employer in any employment under said Employer, the liability hereunder shall cease and determine, and the acceptance thereof shall be a release to the Company of any possible liability under this bond;

THAT the Employer shall, if so required by the Company, duly apply for a warrant for the arrest of the Employee for the dishonest act or acts committed by the Employee, which is the basis of any claim hereunder, and give all the aid and information in its power (at the cost and expense of the Company) to bring the said Employee to justice, or to aid the Company to sue for and obtain reimbursement from the Employee or his estate or third persons, of moneys which the Company shall have paid or become liable to pay, by virtue of this bond;

THAT if any officer or director of said Employer shall become aware of any act of the said Employee which may be made the basis of any claim hereunder, the Employer shall be deemed to have become aware of such act within the meaning of this bond, even though such officer or director shall be in collusion with such Employee;

THAT no one of the above conditions or provisions contained in this bond shall be deemed to have been waived by or on behalf of the Company, unless the waiver be in writing, over the signature of an officer of the Company, and notice to any agent of the Company, or knowledge possessed by any agent of the Company shall not be held to effect

a waiver or change in this contract or any part of it.

IN WITNESS WHEREOF the said Company has caused this bond to be signed by its President and its Assistant Secretary, and its corporate seal to be hereunto affixed this 14th day of April, 1913.

EDWIN WARFIELD,

President,

_____ ,

Secretary.

Examined by _____.

[Stamped across signature:] SAMPLE COPY.

Exhibit "A," page 3. [39]

(COPY)

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

Home Office: Baltimore, Maryland.

BOND No. _____

RIDER.

To be attached to individual fidelity bond No.

(Insert "Individual" or "Schedule")

886,520-A, executed by the Fidelity and Deposit Company of Maryland (hereinafter called Surety), in favor of _____ (hereinafter called Employer), dated the 30th day of April, 1913, and covering F. L. Stewart.

(Insert name of principal or "certain Employees")

WHEREAS, the Employer holds individual fidel-

(Insert "individual" or "Schedule")

ity bond No. 886,520, executed by the Surety and dated the 14th day of April, 1913:

NOW, THEREFORE, the attached bond is is-

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sued by the Surety and accepted by the Employer upon the following express conditions:

First—That the Surety shall not be liable under the bond secondly above described for any default committed after the effective date of the attached bond.

Second—That, for the purpose of giving continuity of protection under said bond secondly above described the time for discovery of loss or making claim thereunder shall be the same as if said bond secondly above described had been continued in force to the date of final termination of the attached bond.

Third—That the liability of the Surety under both of said bonds shall not be cumulative in amount.

Signed, sealed and dated this 30th day of April, 1920.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

By THOS. A. WHELAN,
President.

Attest: E. MOORE,
Assistant Secretary. [40]

Exhibit "B."

(COPY)

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

Home Office: Baltimore, Maryland.

Amount \$25,000.00. Bond No. 886,520A.

The FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, hereinafter called the Surety,

does hereby agree to indemnify Kelso State Bank, of Kelso, Washington, hereinafter called the EMPLOYER, against the loss, not exceeding TWENTY FIVE THOUSAND Dollars (\$25,000.00), of any money or other personal property (including money or other personal property for which the Employer is responsible) through the fraud, dishonesty, forgery, theft, embezzlement, or wrongful abstraction, of F. L. STEWART, hereinafter called the EMPLOYEE, directly or in connivance with others, while the Employee is engaged in the service of the Employer, while this bond is in force.

THE FOREGOING AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:

1. The term of this bond begins on the first day of May, 1920, and continues in force until terminated or canceled as hereinafter provided. Whatever the term may ultimately prove to be, the liability of the surety, either for a single default of the Employee or for any number of such defaults, and irrespective of the time within the term when such defaults occur, shall in no event exceed the penalty of the bond stated in line 6 hereof.

2. Without prejudice to the rights of the Employer as respects anything that may occur during the period that the bond is in force, the Surety may cancel this bond at any time by a written notice stating when the cancellation takes effect, served on the Employer, or sent by registered mail to the Employer at the address hereinbefore stated, at least thirty days prior to the date that the cancellation takes effect. The Employer may cancel

this bond by like notice to the Surety. In case of such cancellation the unearned part of the premium shall be returned to the Employer, if no claim is made hereunder. The Surety's check served on the Employer, or sent by registered mail to the Employer at the address hereinabove stated, shall be a sufficient tender of the said unearned premium.

3. In the event of the death of the Employe during the term of this bond, or of his suspension, dismissal, or retirement from the service of the Employer during the said term, this bond shall thereupon terminate without any action on the part of the Surety. The right to make a claim hereunder shall cease at the end of six months after the termination, expiration, or cancellation of this bond.

4. Upon the discovery by the Employer of any dishonest act on the part of the Employe the Employer shall at the earliest practicable moment, and at all events not later than five days after such discovery, give written notice thereof to the Surety at its home office. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the Surety at its home office within three months after such discovery. Legal proceedings for recovery hereunder may not be brought until three months have elapsed after such proof of loss has been filed with the Surety, nor brought at all unless begun within six months after such proof of loss has been filed with the Surety. If any limitation set forth in this Condition or in Condition numbered 3 above is prohibited

by the statutes of the State in which this bond is issued, the said limitation shall be deemed to be amended to agree with the minimum period of limitation permitted by such statutes.

5. Upon the discovery by the Employer of any dishonest act on the part of the Employee this bond shall terminate, without any action on the part of the Surety, as to any act committed thereafter by such Employee.

6. If the Employer shall sustain any loss that might be made the basis of a claim hereunder, and shall settle or compromise such loss with the Employee without first securing the consent of the Surety to such settlement or compromise, this bond shall thereupon become void from the beginning.

7. In the event of a claim hereunder, the Employer, whenever required by the Surety to do so, shall give the Surety all the information and evidence possessed by the Employer, and shall, at the request and cost of the Surety, aid in securing information and evidence, and shall render all assistance (other than pecuniary assistance) that the Employer can render, for the purpose of bringing to justice, prosecuting and convicting criminally the Employee, and for the purpose of enabling the Surety to procure reimbursement from the Employee or his estate of any loss, damage or expense sustained by the Surety hereunder.

8. The Employer and the Surety shall share any recovery (excluding insurance and reinsurance) made by either on account of any loss in the pro-

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portion that the amount of the loss borne by each bears to the total amount of the loss.

IN TESTIMONY WHEREOF, the FIDELITY AND DEPOSIT COMPANY OF MARYLAND has caused this bond to be signed by its duly authorized officers, and its corporate seal to be hereunto affixed, this 30th day of April, A. D. 1920.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

By EDWIN WARFIELD,
President.

Attest: _____

Assistant Secretary.

[Stamped across face:] SPECIMEN.

Exhibit "B." [41]

(COPY)

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

RIDER.

To be attached to Fidelity Bond No. 886,520, executed by the Fidelity and Deposit Company of Maryland (hereinafter called Fidelity) as surety, bearing date the 14th day of April, 1913, in the penalty of Twenty-five thousand Dollars (\$25,000.-00), and covering F. L. Stewart (hereinafter called Employee), as Cashier in the employ of Kelso State Bank (hereinafter called Employer), for the term one year beginning on the 1st day of May, 1913.

WHEREAS, the American Bonding Company of Baltimore (hereafter called American) executed, as

surety, its certain fidelity bond No. 702,421-H. O. 407,274, dated on or about the 28th day of April, 1911, in the penalty of Twenty-five Thousand Dollars (\$25,000.00), and covering the Employee in the employ of the Employer, for the term one year beginning on the 1st day of May, 1911, which said bond was continued in force from time to time thereafter until the 1st day of May, 1913.

NOW, THEREFORE, in consideration of the payment of an annual premium, to wit, the sum of sixty-two and 50/100 Dollars (\$62.50), or an annual premium to be hereafter agreed upon between the "Fidelity" and the "Employer," the Fidelity does hereby agree that the "Employer" may recover under the said bond of the "Fidelity" attached hereto, any loss the "Employer" may have sustained under said bond of the "American" (subject to its terms and conditions) during the period beginning on the 1st day of May, 1911, and ending on the 1st day of May, 1913, which could have been recovered under said bond of the "American," had it been continued in force by Continuation Certificates until the expiration of the term of said bond of the "Fidelity," and all continuations or renewals of said bond of the "Fidelity."

PROVIDED, such loss be discovered within the time within which a loss under said bond of the "American" must be discovered, had said bond of the "American" been continued in force as aforesaid; and

PROVIDED, also, that from and after the 1st day of May, 1913, and thereafter so long as said

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bond of the "Fidelity" shall be continued in force, the "Employer" shall have the right to recover from the "Fidelity" any losses incurred through the acts of said "Employee" in violation of the terms and conditions of said bond of the "Fidelity"; and

PROVIDED, further, that the amount recoverable under both of said bonds and all continuations and renewals of them or either of them, shall in no event exceed the sum of twenty-five thousand dollars (\$25,000.00).

SIGNED, sealed and dated this 14th day of April, 1913.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

By EDWIN WARFIELD,
President.

Attest: _____

Asst. Secty.

Exhibit "B," page 2. [42]

Exhibit "C."

FIDELITY DEPARTMENT.
AMERICAN BONDING COMPANY
OF BALTIMORE,

Home Office: Equitable Building.

Baltimore, April 27th, 1911.

To the Vice-President of the KELSO STATE
BANK, located at Kelso, Washington.

An application has been made to this Company
to become surety on a Bond for Mr. F. L. Stewart,

as Cashier in your service, at Kelso State Bank, to the amount of \$25,000.00.

Before passing on the said application the Company must have answers to the following questions.

Very respectfully yours,
AMERICAN BONDING COMPANY OF
BALTIMORE.

QUESTIONS.

ANSWERS.

1. (a) To whom is the bond to be made payable? (a) Kelso State Bank.
Give exact title.
- (b) State capital and resources of bank on (b) Capital \$25000.00
Apr. 26th, 1911. Surplus \$25000.00
Loans \$231203.69
Deposits \$237862.58
Undivided Profits.
\$.....
- (c) State or National. State. Date:
April 27, 1911.
2. (a) From what date is the bond to be written, (a) May 1st 1911. \$25000.00
and for what amount?
- (b) What further security, if any, will be re- (b) None.
quired from applicant?
- (c) Who will pay the premium for the bond (c) The Bank.
required?
3. (a) How long have you known the applicant? (a) Twelve years.

QUESTIONS.

ANSWERS.

- | | |
|---|-----------------------------------|
| (b) How long has he been in the bank's service? | (b) Twelve years. |
| (c) Has he hitherto furnished security to the bank? | (c) Yes. |
| (d) If so, who furnished it? | (d) The National Surety Co. |
| (e) If not, why is this bond now required? | (e) He volunteered to give bonds. |
- Exhibit "C," page 1. [43]
4. (a) Has the applicant uniformly given satisfaction in his personal conduct and habits?
- (a) Yes.
- (b) Have you any knowledge of, or any information of, or are you aware of any habit of the applicant, or of any circumstances unfavorably affecting the risk to the surety on the bond applied for? If so, state particulars.
- (b) No.

QUESTIONS.

5. Is the applicant now, or has he been from any cause indebted to the bank or its officers? If so, give particulars, stating amount, how incurred and how payment is secured.
6. (a) Is the applicant now, or about to be, engaged or interested in any other business or employment than in the bank's service?
(b) If so, does the bank approve such division of interest or occupation?
7. (a) What will be the title of applicant's position?
(b) Explain fully his duties in connection therewith.
8. What salary will the applicant receive?

ANSWERS.

- He does not owe the bank at all.
- (a) He is state senator from this county but has no other employment.
(b)
- (a) Cashier.
(b) Regular cashier's duties. Has two assistants. Has had this position for 12 years steadily. \$200.00 per month.

QUESTIONS.

9. (a) In case of the applicant acting as Teller, will he be required to balance his cash daily, and report same to his superior officer?
- (b) Will a record of such report be kept?
10. (a) Will the applicant have access to the treasury of the Bank?
- (b) If so, under what restrictions?
11. In case of applicant handling cash or securities, how often will the same be examined and compared with the books, accounts and vouchers, and by whom?
12. (a) Has applicant always faithfully, honestly and punctually accounted to you for all moneys and property heretofore under his control or custody as your employee?

ANSWERS.

- (a) The cash is balanced daily by the cashier, the two assistants and the bookkeeper, all working.
- (a) Yes.
- (b) The usual restrictions.
Exhibit "C," page 2. [44]
Cash is examined every night. Securities all inventoried every week by some officer other than himself.
- (a) Yes.

QUESTIONS.

ANSWERS.

- (b) Are applicant's accounts at this date in every respect correct and proper securities, property and funds on hand to balance his accounts?
(b) Yes.
13. (a) Are the pass-books of your depositors periodically balanced?
(a) Yes.
(b) How often?
(b) Once a month or oftener.
(c) By what employee of the bank?
(c) One of the assistant cashiers.
14. (a) Does the bank require its bookkeeper to change ledgers?
(a) No, but its ledger is checked by 4 men.
15. (b) If so, at what periods?
(a) Jan. 17, 1911, by A. V. Hayden, Deputy.
(b) Was the result of such examination, so far as known to the Bank's Officers and Directors, entirely satisfactory to that official?
(b) Yes. We have the bank examiner's letter stating that condition was satisfactory.
16. How many officers and employees are engaged in the active service of the bank?
Six.

It is agreed that the above answers shall be warranties and form a part of, and be conditions precedent to the issuance, continuance or any renewal of or substitution for, the bond that may be issued by the AMERICAN BONDING COMPANY OF BALTIMORE, in favor of the undersigned, upon the person above named.

Exhibit "C," page 3. [45]

Dated Kelso, Wash., this 27th day of April, 1911.

KELSO STATE BANK.

By F. M. CAROTHERS,
Official Title Vice-President.

THIS FORM MUST BE RETURNED TO THE HOME OFFICE, BALTIMORE, MD., BEFORE BOND WILL BE ISSUED.

On Margin: "BOND CANNOT BE EXECUTED UNTIL THIS FORM IS FULLY COMPLETED AND RETURNED TO THE COMPANY."

Exhibit "C," page 4. [46]

Exhibit "D."

886520.

USED ONLY IN RENEWING BONDS OF THE
AMERICAN BONDING COMPANY.

FIDELITY SECTION.

FIDELITY AND SURETY DEPARTMENT.
FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.

Home Office:—Baltimore, Maryland.

I hereby make application to the FIDELITY
AND DEPOSIT COMPANY OF MARYLAND

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(hereinafter called the Company) for bond to date from May 1st, 1913 for \$25,000.00 in favor of Kelso State Bank as security to cover my position as Cashier.

The Company is hereby authorized, without further request from me, to execute, as surety, or to procure the execution of not only the bond herein applied for, but any and all bonds which may be required of me in the service of this, or any other employer, and to consent, as often as it may deem necessary, to a change in such bonds, or the bond herein applied for, or any of them, so as to cover me in a different position, or amount, or in the service of a different employer.

And in consideration of the execution, or procurement, of such bonds by the Company, I agree to pay the Company an annual premium in advance of Sixty Two & 50/100 dollars (\$62.50) for the bond herein applied for, and such other premium or premiums as may be agreed upon for any other bond or bonds which the Company may execute or procure; and I do further agree to indemnify the Company against all loss, liability, costs, damages, charges and expenses whatever which the Company may sustain or incur by reason of having executed, or procured the execution of, the bond herein particularly applied for, or any of the bonds which said Company is, by this instrument, authorized to execute or procure, or any renewal or continuance of any of the aforesaid bonds, including counsel and attorney's fees which it may incur in connection with any litigation or investi-

gation relating to its rights or liabilities under any of said bonds; and I do agree to pay all expenses, including reasonable attorney's fees that the Company may incur in enforcing any of the agreements herein contained. And I do further agree that the vouchers or other evidence of payment of any such loss, liability, costs, damages, charges or expenses shall be taken as *prima facie* evidence against me and my estate of the fact and extent of my liability to the Company.

I hereby further agree that the Company shall have the absolute right to decline to issue any such bond, or if any such bond be issued, to decline to renew or continue same, and to cancel at any time any such bond or any renewal or continuance thereof; and that the Company shall be under no obligation to disclose its reasons therefore or to give any information in connection therewith, the provisions of any law to the contrary being hereby expressly waived by me.

And as an additional consideration, I hereby waive all right to claim any of my property, including my homestead, as exempt from levy, execution, sale or other legal process under the laws of this or of any other state.

IN TESTIMONY WHEREOF, I hereunto set my hand and seal this [47] 24th day of April, 1913.

Exhibit "D," page 1.

Witness: AGNES LOFTUS.

F. L. STEWART. (Seal)

EMPLOYER'S CERTIFICATE.

It is agreed that the information previously furnished by the undersigned to the American Bonding Company, of Baltimore, Maryland, regarding the above-named Employee, his duties and employment and the supervision exercised over the work and acts of the Employee, shall be warranties and shall constitute the basis of and form part of the Bond, or any continuation or continuations thereof, that may be issued by FIDELITY AND DEPOSIT COMPANY OF MARYLAND to the undersigned in behalf of the Employee whose application appears above.

As Employer the undersigned certifies and warrants that the Employee has always faithfully, honestly, and punctually accounted for all money and property in his custody or under his control, and has performed his duties in an acceptable and satisfactory manner. We know of nothing in his habits affecting unfavorably his title to confidence and we know of no reason why a Guarantee Bond in his behalf should not be issued.

Dated at Kelso, Wash., the 24th day of April, 1913.

KELSO STATE BANK.

By F. M. CAROTHERS, Pres.,

(Officer's name and title if corporation.)

(Seal of Kelso State Bank of Kelso, Washington.)

Exhibit "D," page 2. [48]

Exhibit "E."

(COPY)

Employer's Expiration Notice.

Fidelity Department.

Renewal Division.

**FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.**

Home Office, Fidelity Building.

Baltimore, April 23, 1914.

Kelso State Bank,

Kelso, Wash.

Dear Sir:

We hereby notify you that Bond No. 13,601 for \$25,000.00 issued by this Company on behalf of F. L. Stewart, in your employ as cashier, will expire on the 1st day of May, 1914, next.

The continuation premium, \$62.50 should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed and forward with remittance for premium to F. L. Stewart, Kelso, Wash., when the continuation receipt will be sent to you.

Yours respectfully,

EDWIN WARFIELD,

President.

To Fidelity and Deposit Company of Maryland:

This is to Certify, That since the issue of the above bond Mr. F. L. Stewart, has faithfully, honestly and punctually accounted to me for all money and property in his control or custody as my employee, has always had proper securities and funds

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on hand to balance his accounts, and is not now in default to me.

Dated April 23, 1914.

KELSO STATE BANK.

Signed—F. M. CAROTHERS.

(Signed) WALTER N. SMITH,

Witness.

(Corporate Seal Kelso State Bank.) [49]

Exhibit "F."

(COPY)

Employer's Expiration Notice.

Fidelity Department.

Renewal Division.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.

Home Office, Fidelity Building.

Baltimore, Apr. 14, 1915.

Kelso State Bank,

Kelso, Wash.

Dear Sir:

We hereby notify you that Bond No. 13601 for \$25,000.00 issued by this company on behalf of F. L. Stewart, in your employ as Cashier, will expire on the 1st day of May, 1915, next.

The continuation premium, \$62.50, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed and forward with remittance

for premium to F. L. Stewart, Agt., Kelso, Wash.,
when the continuation receipt will be sent to you.

Yours respectfully,

EDWIN WARFIELD,

President.

To Fidelity and Deposit Company of Maryland:

THIS IS TO CERTIFY, That since the issue of
the above bond Mr. F. L. Stewart, has faithfully,
honestly and punctually accounted for all money
and property in his control or custody as my em-
ployee, has always had proper securities and funds
on hand to balance his accounts, and is not now in
default to me.

Dated, April 20th, 1915.

KELSO STATE BANK.

Signed—F. W. CAROTHERS,

President. [50]

Exhibit "G."

(COPY)

Employer's Expiration Notice.

Fidelity Department.

Renewal Division.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.

Home Office, Fidelity Building.

Baltimore, April 11, 1915.

Kelso State Bank,

Kelso, Wn.

Dear Sir:

We hereby notify you that Bond No. 13601 for
\$25,000.00 issued by this company on behalf of F.

74 *Fidelity & Deposit Company of Maryland*

L. Stewart, in your employ as cashier, will expire on the 1st day of May, 1916, next.

The continuation premium, \$62.50, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed and forward with remittance for premium to F. L. Stewart, Agt., Kelso, Wash., when the continuation receipt will be sent to you.

Yours respectfully,

EDWIN WARFIELD,

President.

To Fidelity and Deposit Company of Maryland:

THIS IS TO CERTIFY, That since the issue of the above bond Mr. F. L. Stewart, has faithfully, honestly and punctually accounted to me for all money and property in his control or custody as my employee, has always had proper securities and funds on hand to balance his accounts, and is not now in default to me.

Dated, Apr. 29, 1916.

KELSO STATE BANK.

Signed—J. R. CATHIN,

Vice-President.

(Sgd.) E. A. KNIGHT. [51]

Exhibit "H."

(COPY)

Employer's Expiration Notice.

Fidelity Department.

Renewal Division.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.

Home Office, Fidelity Building.

Baltimore, April 9th, 1917.

Kelso State Bank,

Kelso, Wash.

Dear Sir:

We hereby notify you that Bond No. 13601 for \$25,000 issued by this company on behalf of F. L. Stewart, in your employ as cashier, will expire on the 1st day of May next.

The continuation premium, \$62.50, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed and forward with remittance for premium to F. L. Stewart, Kelso, Wash., when the continuation receipt will be sent to you.

Yours respectfully,

EDWIN WARFIELD,

President.

To Fidelity and Deposit Company of Maryland:

THIS IS TO CERTIFY, That since the issue of the above bond Mr. F. L. Stewart has faithfully, honestly and punctually accounted to me for all money and property in his control or custody as my

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employee, has always had proper securities and funds on hand to balance his accounts, and is not now in default to me.

Dated, April 12, 1917.

KELSO STATE BANK,
Signed—F. M. CAROTHERS,
President. [52]

Exhibit "I."

(COPY)

Employer's Expiration Notice.

Fidelity Department.
Renewal Division.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.

Home Office, Fidelity Building.

Baltimore, April 10th, 1918.

Kelso State Bank,
Kelso, Washington.

Dear Sir:

We hereby notify you that Bond No. 13601 for \$25,000.00 issued by this company on behalf of F. L. Stewart, in your employ as cashier, will expire on the 1st day of May next.

The continuation premium, \$62.50, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed and forward with remittance

for premium to —, when the continuation receipt will be sent to you.

Yours respectfully,

EDWIN WARFIELD,

President.

4-20.

To Fidelity and Deposit Company of Maryland:

THIS IS TO CERTIFY, That since the issue of the above bond Mr. F. L. Stewart has faithfully, honestly and punctually accounted to me for all money and property in his control or custody as my employee, has always had proper securities and funds on hand to balance his accounts, and is not now in default to me.

Dated, Apr. 15, 1918.

KELSO STATE BANK.

Signed—By F. M. CAROTHERS,

President. [53]

Exhibit "J."

(COPY)

Employer's Expiration Notice.

Fidelity Department.

Renewal Division.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.

Home Office, Fidelity Building.

Baltimore, April 28, 1919.

Kelso State Bank,

Kelso, Wash.

Dear Sir:

We hereby notify you that Bond No. 13601 for

78 *Fidelity & Deposit Company of Maryland*

\$25,000.00 issued by this company on behalf of F. L. Stewart, in your employ as cashier, will expire on the 1st day of May next.

The continuation premium, \$62.50, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed and forward with remittance for premium to Geo. F. Plamandon, Kelso, Wash., when the continuation receipt will be sent to you.

Yours respectfully,

EDWIN WARFIELD,

President.

To Fidelity and Deposit Company of Maryland:

THIS IS TO CERTIFY, That since the issue of the above bond Mr. F. L. Stewart has faithfully, honestly and punctually accounted to me for all money and property in his control or custody as my employee, has always had proper securities and funds on hand to balance his accounts, and is not now in default to me.

Dated, April 28, 1919.

KELSO STATE BANK.

Signed—By F. M. CAROTHERS,

Pres. [54]

Exhibit "K."

(COPY)

Employer's Expiration Notice.

Fidelity Department.

Renewal Division.

**FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.**

Home Office, Fidelity Building.

Baltimore, ———, 19—.

Kelso State Bank,

Kelso, Wash.

Dear Sir:

We hereby notify you that Bond No. 13601 for \$25,000.00 issued by this company on behalf of F. L. Stewart, in your employ as cashier, will expire on the 1st day of May next.

The continuation premium, \$62.50, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed and forward with remittance for premium to Geo. F. Plamondon, Kelso, Wash., when the continuation receipt will be sent to you.

Yours respectfully,

EDWIN WARFIELD,

President.

To Fidelity and Deposit Company of Maryland:

THIS IS TO CERTIFY, That since the issue of the above bond Mr. F. L. Stewart has faithfully, honestly and punctually accounted to me for all money and property in his control or custody as my

employee, has always had proper securities and funds on hand to balance his accounts, and is not now in default to me.

Dated, Apr. 26, 1920.

Signed—F. M. CAROTHERS,

Pres. [55]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 8, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [56]

Stipulation Re Amendment of Answer.

It is hereby stipulated by and between Messrs. Miller, Wilkinson and Miller, attorneys for plaintiff in the above-entitled action, and Messrs. Grinstead and Laube, attorneys for defendant in the above-entitled action, that defendant's answer herein may be amended as follows:

I.

By inserting in line one on page 16 of said answer after the word "complaint" and before the word "defendant," the following: "and as a seventh affirmative defense and for a setoff against said plaintiff."

II.

By striking out of said answer, paragraphs IX, X, XI, XII, XIII, XIV (erroneously numbered XIX in said answer) and XV (erroneously numbered XX in said answer), being the last nine lines of page 18 of said answer, all of pages 19, 20, 21

and the first thirteen lines of page 22 of said answer; and by inserting in lieu thereof the following paragraph IX:

“That by reason of the premises, this defendant has a claim in the amount of Forty-six Thousand One Hundred and Sixty-three Dollars and Twenty-nine Cents (\$46,163.29), as of the date of the execution of said depository bonds, against the Kelso State Bank and the plaintiff herein as successor of said bank, and said plaintiff as its successor is now indebted to this defendant in the full sum of Forty-six Thousand One Hundred and Sixty-three Dollars and Twenty-nine Cents (\$46,163.29) as of the date of the execution of said depository bonds by said Kelso State Bank as principal and this defendant as surety in favor of said Linus Perry Brown, Treasurer of Cowlitz County, Washington; which sum this defendant is entitled to have set off against any judgment [57] which plaintiff might otherwise be entitled to recover herein.”

III.

And to strike out paragraphs II and III of the prayer of said answer on page 22 thereof, and insert in lieu thereof the following:

II. That upon the trial of this action, this defendant be adjudged and declared to have a valid setoff against said plaintiff in the sum of Forty-six Thousand One Hundred and Sixty-three Dollars and Twenty-nine Cents (\$46,163.29), or such portion thereof as will

equal the amount, if any, which plaintiff might otherwise be entitled to recover from this defendant.

III. That said setoff be without prejudice to the rights of this defendant to recover from plaintiff in the ordinary course of administration of said Kelso State Bank or otherwise the balance which said plaintiff may owe this defendant over and above the amount of said set-off.

That upon signing of this stipulation, said answer may be considered as amended accordingly without the necessity of filing a new answer herein, and the new matter herein deemed denied without the necessity of filing a reply.

Dated this 7th day of July, 1922,

MILLER, WILKINSON & MILLER,

Attorneys for Plaintiff,

GRINSTEAD & LAUBE,

Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 11, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [58]

Reply.

Comes now the plaintiff in the above-entitled matter and for reply to the defendant's answer filed herein admits, denies and alleges as follows:

I.

Replying to Paragraph V of the answer filed

herein this plaintiff denies that the extension of the bond referred to in said paragraph and denies that the continuations thereof were made in reliance upon or in consideration of statements made by the said Kelso State Bank to the defendant, and denies that any such statements were warranties of the facts contained therein.

Replying to the first affirmative defense:

I.

This plaintiff denies each and every allegation therein contained except what is hereinafter admitted to be true.

II.

The plaintiff admits Paragraphs I and II of the first affirmative defense.

III.

The plaintiff admits Paragraph III of the first affirmative defense except this plaintiff denies that the defendant relied upon statements made in the application and denies that the defendant relied upon representations and warranties contained in the policies and applications as alleged in said paragraph.

As a further reply to the first affirmative defense the plaintiff alleges: [59]

I.

That the bonds and extensions of bonds issued by the defendant to the said Kelso State Bank for the years 1917, 1918, 1919, 1920 and 1921 were issued in pursuance and in compliance with the laws of the State of Washington.

II.

That during all of the time mentioned and re-

ferred to in the Answer of the defendant the said F. L. Stewart was the cashier of the Kelso State Bank and owned and controlled a majority of the stock of the corporation and was in general charge of the affairs of the bank and the defendant was fully informed of the fact that Stewart owned and controlled the funds in the bank and was the general manager and in general charge of the bank and with such knowledge executed the bonds mentioned and referred to.

III.

That during the years 1916, 1917, 1918, 1919, 1920 and 1921 and at the time the bonds and extensions of the bonds were issued during said years the defendant's agent at Kelso was the assistant cashier and a regular employee in the Kelso State Bank and was fully informed of all of the conditions of the bank and its financial resources and liabilities.

For reply to the second affirmative defense this plaintiff denies each and every allegation hereof.

For reply to the third affirmative defense this plaintiff denies each and every allegation thereof.

For reply to the fourth affirmative defense this plaintiff denies each and every allegation thereof.

[60]

For reply to the fifth affirmative defense this plaintiff denies each and every allegation thereof.

For reply to the further answer and partial defense this plaintiff denies each and every allegation thereof.

For reply to the seventh further and separate answer this plaintiff alleges as follows:

I.

Plaintiff denies each and every allegation therein contained except what is hereinafter admitted to be true.

II.

Plaintiff admits Paragraphs I, II, III, IV and VII thereof.

III.

For reply to Paragraph VIII of the seventh further and separate defense this plaintiff admits that the defendant filed its claim with the Supervisor of Banking on account of money paid to the county treasurer of Cowlitz County, Washington, for the sum of \$46,163.29 and the said sum was allowed and approved as a general claim on the 25th day of April, 1921, and further answering said paragraph this plaintiff alleges that a dividend of twenty (20%) per cent has been paid upon said claim and accepted by the defendant.

IV.

Answering Paragraph IX this plaintiff admits that the defendant has a general claim for \$46,163.29, which has been approved and stands as an approved claim with the officers in charge of liquidating the affairs of the bank. [61]

V.

For reply to Paragraphs X, XI, XII, XIII, XIV and XV of the seventh further and separate defense this plaintiff admits that an action is now pending in the United States District Court of the District of Oregon between the parties set forth in said paragraphs of defendant's answer and that the plead-

ings in said cause set forth the claims of the respective parties, but this plaintiff denies that said action in any manner affects the rights of the parties to this action.

WHEREFORE plaintiff demands judgment as prayed for in the complaint.

MILLER, WILKINSON & MILLER,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Apr. 17, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [62]

Stipulation Waiving Jury Trial.

IT IS HEREBY STIPULATED and agreed between the attorneys for the respective parties in the above-entitled matter that a jury for the trial of this cause shall be waived and this cause tried before the Court without a jury, giving to the Court full and complete jurisdiction to try this cause without a jury and to make findings of fact and conclusions of law and to enter judgment therein as fully and completely as if a jury had been called to try the issues submitted to them.

MILLER, WILKINSON & MILLER,
Attorneys for Plaintiff.

GRINSTEAD & LAUBE,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 23, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [63]

Decision on the Merits.

Filed February 23, 1923.

MILLER, WILKINSON & MILLER, for Plaintiff.
GRINSTEAD & LAUBE, THOMAS E. DAVIS,
Esq., for Defendant.

CUSHMAN, D. J.—T. H. Adams, a Special Deputy Supervisor of Banking in the State of Washington, he being a citizen of the State of Washington, sued the defendant, a Maryland corporation, upon two of its bonds given the Kelso State Bank to secure the bank against loss sustained by it on account of the dishonesty of its cashier.

After removal of the cause from the State court to this court, the defendant demurred on the ground that plaintiff had no legal capacity to sue and that there was a defect of parties plaintiff. Plaintiff confessed the demurrer and the present plaintiff, John P. Duke, Supervisor of Banking of the State of Washington, liquidating the Kelso State Bank, was substituted as plaintiff.

There is no allegation in the record as to his citizenship, but section 10809, Remington's Compiled Statutes of Washington, 1922, provides: [64]

“The director of taxation and examination shall appoint and deputize an assistant director, to be known as the supervisor of banking, who shall have charge and supervision of the division of banking, and shall have power, with the approval of the director, to appoint and employ such deputies, examiners, inspectors, and cleri-

cal and other assistants as may be necessary to carry on the work of the division. *No person shall be eligible to appointment, as, or hold the office of, supervisor of banking, unless he is, and for at least two years prior to his appointment has been, a citizen of this state, and has had practical experience in banking, trust company, or building and loan company business, nor if he is interested in any bank, trust company, or building and loan association, as a director, officer, or stockholder.*"

In the absence of any showing to the contrary, in view of the foregoing and the fact that this Court takes judicial notice of the statutes of the state where it is held, and the presumption of the regularity of official action, the court concludes that this constitutes the equivalent of an allegation in the record of plaintiff's citizenship as that of the State of Washington.

Under the foregoing section, the supervisor of banking and not the director of taxation is the proper party plaintiff.

Duke vs. Johnson, 22 Wash. Dec. 486, Duke vs. Bolster, 23 Wash. Dec. 27.

By written stipulation, a jury was waived in this case and the cause tried to the court.

It is alleged that the bank became insolvent in March, 1921, and the Supervisor of Banking in Washington took possession.

The first bond, given in 1913, was conditioned for the reimbursement of the bank for such pecuniary loss as it might sustain by reason of any dishonest

act or acts of the cashier, and continued in force until May, 1920, when a new bond for one year was given indemnifying the bank for any fraud, dishonesty, forgery, theft, embezzlement, or wrongful abstraction of the cashier. It is alleged that, by reason of certain described dishonest and fraudulent acts of the cashier during the years 1915 to 1921, inclusive, [65] the bank lost in amounts exceeding, in the aggregate, \$25,000—that being the amount for which the bonds were written.

The defendant, by its answer, avers that the Supervisor of Banking took possession of the bank and its assets and is the officer in charge of its liquidation. Defendant sets up the affirmative defense that certain statements made upon the part of the bank, upon which the bonds were given and upon which the renewals of the first bond were made, were untrue; were relied upon by the defendant and that, but for them, the bonds would not have been given or the renewals made.

When the original bond was written by defendant's predecessor, certain questions were propounded to the bank and the bank made answer thereto. Among these, were the following:

- “12. (a) Has applicant always faithfully, honestly and punctually accounted to you for all moneys and property heretofore under his control or custody as your employee? (a) Yes.
(b) Are applicant's accounts at this date

in every respect correct and proper securities, property and funds on hand to balance his accounts?

(b) Yes."

In 1913, the following certificate was given defendant upon the part of the bank:

"It is agreed that the information previously furnished by the undersigned to the American Bonding Company, of Baltimore, Maryland, regarding the above-named Employee, his duties and employment and the supervision exercised over the work and acts of the Employee, shall be warranties and shall constitute the basis of and form part of the Bond, or any continuation or continuations thereof, that may be issued by FIDELITY AND DEPOSIT COMPANY OF MARYLAND to the undersigned in behalf of the Employee whose application appears above.

"As Employer the undersigned certifies and warrants that the Employee has always faithfully, honestly, and punctually accounted for all money and property in his custody or under his control, and has performed his duties in an acceptable and satisfactory manner. We know of nothing in his habits affecting unfavorably his title to confidence and we know no reason why a Guarantee Bond in his behalf should not be issued.

“Dated at Kelso, Wash., the 24th day of April, 1913. [66]

KELSO STATE BANK.

By F. M. CAROTHERS,

Pres.

(Officer's name and title if corporation.)”

(Seal of Kelso State Bank of Kelso, Washington.)

It is alleged that renewals of the bond, made in 1914 to 1919, were made upon certificates signed by either the President or Vice-President of the bank, reading:

“To Fidelity and Deposit Company of Maryland:

THIS IS TO CERTIFY, That since the issue of the above bond Mr. F. L. Stewart has faithfully, honestly and punctually accounted to me for all money and property in his control or custody as my Employee, has always had proper securities and funds on hand to balance his accounts, and is not now in default to me.

Dated April 23, 1914.

KELSO STATE BANK,

F. M. CAROTHERS,

Pres.

(Sgd.) WALTER N. SMITH,

Witness.”

and that the bond given in May, 1920, was given upon a like certificate.

The bond first given contained the following provisions:

“That there shall be a complete inspection of the accounts and books of the Employee on behalf of the Employer at least once in every

twelve months from the date of this bond, such inspection to include examination of all cash and securities of which the Employee shall have custody or charge”;

It is further averred:

“ * * * That said alleged dishonest and fraudulent acts are stated in said complaint to consist of the giving and renewal of certain notes stated in said complaint during said years above mentioned, and this defendant alleges on information and belief that during all of said times said notes were in the possession of said Kelso State Bank, and were kept in the proper files of said bank and were at all times open to inspection by the officers of said bank, and that said bank and the officers thereof knew, during the years 1915, 1916, 1917, 1918, 1919, 1920 and 1921, of said notes, and had access to same; and if there was any fraud or dishonesty in connection with the taking of said notes or the renewal of the same, said fraud or dishonesty would have been discovered by said bank and by said officers of said bank, had said officers complied with the warranties and representations contained in the applications hereinbefore mentioned, and in the statements contained in the certificates hereinbefore mentioned.”

Plaintiff, by his reply, denies that defendant relied, in giving the bonds, upon such statements made in the certificates [67] or upon the recital in the bonds and avers that the extensions from 1917 to May, 1920, and the bond of May 1, 1920, were

issued in compliance with the laws of the State of Washington, and avers that the cashier owned and controlled the affairs of the bank and was in general charge of its affairs at all times in question, of which fact the defendant was well informed. That, during the years 1916 to 1921, the defendant's agent at Kelso was the assistant cashier of such bank and was fully informed of all the conditions of the bank.

The further affirmative defense is set up that the cashier, during the period covered by the bonds, repeatedly borrowed money upon his personal notes and under his trade name of Kelso Farm Company, without previous consent thereto by the Board of Directors of the bank; that the officers and directors of the bank knew of his having done this and did not report it to the defendant, nor obtain its consent; that such acts were in violation of law and of the bonds. The allegations of this defense are denied by plaintiff.

As a further affirmative defense, defendant avers that the cashier, with the knowledge of the bank, engaged in speculative enterprises and became financially embarrassed through such ventures; that the bank failed to give the defendant notice thereof and that, if the defendant had been so notified, it would have cancelled its bond. Plaintiff denies the allegations of this defense.

The further affirmative defense is made that the bond given in 1913 provided:

“That if, without previous notice to and consent of the Company thereto, in writing, the Employer shall continue the Employee in its

employment, after having become aware of any act which may be made the basis of any claim hereunder, or make any settlement with the Employee for any loss hereunder, or do any act whereby the liability of the Employee to the Employer is changed in any material respect, this bond shall be null and void, both as to any existing or future liabilities hereunder, and any wilful misstatement or suppression of facts in any claim made hereunder shall render this bond void from the beginning.” [68]

and that issued in 1920:

“If the Employer shall sustain any loss that might be made the basis of a claim hereunder, and shall settle or compromise such loss with the Employee without first securing the consent of the Surety to such settlement or compromise, this bond shall thereupon become void from the beginning.”

That the bank violated these provisions of the bonds by, on May 26, 1919, making a settlement with the cashier with knowledge of all the transactions upon which this suit is based; that the settlement was made without notice to defendant and without its consent and that the cashier thereafter continued in its employ without notice to, or the consent or knowledge of the defendant. Plaintiff denies this allegation.

A further affirmative defense alleges that the bond first given provided:

“That if the Employer shall at any time hold concurrently with this bond, or represent to the Company in any statement to it, that it does or will at any time hold concurrently with this bond, any other bond or guarantee of security from or on behalf of the Employee, the Employer shall be entitled, in the event of loss as hereinbefore stated, to claim hereunder only such proportion of the loss as the amount covered by this bond bears to the whole amount of security carried, or so stated as carried or to be carried on the Employee’s behalf, whether the Employer shall be able to reimburse itself from such other bond or guarantee so carried or stated to be carried, or not, or whether the same has been allowed to lapse or not”;

That the bank held, after May 26, 1916, a written guarantee of security, same being the cashier’s guarantee of notes and mortgages held by the bank up to \$50,000. The allegations of this defense are denied by plaintiff in his reply.

A further defense and setoff is asserted because of \$46,163.29 paid by the defendant to the treasurer of Cowlitz County on account of bonds of the defendant given the county treasurer to secure him for moneys deposited in the bank. No right accrued to defendant because of this transaction that can be asserted in the present suit upon its bond. [69]

Under these issues and the evidence, upon the part of the defendant it is first contended that there can be no judgment against the defendant, other than that, by setoff, the indebtedness of the bank

to the defendant is reduced because of items here found against the defendant.

The statutes of the State of Washington relating to counterclaims and setoffs are:

“The counterclaim mentioned in the preceding section must be one existing in favor of a defendant, and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

“1. A cause of action arising out of the contract, or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action;

“2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.” (Sec. 265, Rem. Comp. Stats. 1922.)

“The defendant in a civil action upon a contract expressed or implied, may set off any demand of a like nature against the plaintiff in interest, which existed and belonged to him at the time of the commencement of the suit. And in all such actions, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such

demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him." (Sec. 266, Rem. Comp. Stats. 1922.)

The claim of setoff in the instant case is based upon the assigned claim of the county treasurer to the defendant, made after the closing of the bank. This defendant was also surety for the bank to the county treasurer for any loss of public funds deposited which the county might sustain. Following the closing of the bank, the defendant paid the county treasurer \$46,163.29 and took an assignment of the claim of the latter. The company presented the claim to the liquidating officer of the bank, based on the assignment, the claim was approved, and twenty per cent dividend has been paid on the claim. [70]

The present suit is an action upon the bond of Stewart, the cashier, securing the bank against his dishonest acts.

It is not deemed necessary to determine whether the present suit is one to recover upon a contract or for a tort; nor to determine, if upon a tort, the effect it would have on defendant's right to setoff; nor will the Court consider the effect of defendant's right to interpose the equitable right of setoff in an action at law; nor consider the effect or application to the present suit of those Washington cases hold-

ing that, when a corporation becomes insolvent, all of its assets become a trust fund for the benefit of all of its creditors; nor is it necessary to consider whether the inception of defendant's right is fixed by the date of its payment to the county treasurer upon its bond, or relates back to the time of the giving of that bond. It will be sufficient to say that such equities as are with the defendant are, obviously, not of the strongest character, for defendant is asking to pay two of its debts by paying one of them. This it might be permitted to do if the question was solely one between the defendant and the bank.

While the bond given by the defendant to secure the county treasurer for moneys deposited by him in the bank was expressly required for the security of the depositor, it is to be clearly inferred that the bond upon which suit is here brought was to secure the bank depositors, generally, including the county treasurer for his deposits. In equity, there would be no right to setoff the amount paid on the former bond against the amount due on the latter, because of the prejudice it would work to those for whose protection the latter bond was in part at least required.

Defendant further contends:

“That the obligations sued on here constitute contracts valid at common law and that they were not written under, pursuant to or in compliance with any statutory law whatever.”

The Banking Act of 1917 provides: [71]

“The board or directors of each bank and trust company shall require its active officers and employees and such other officers as they shall designate, each to give a surety company bond, in such sum as the board shall specify and the state bank examiner shall approve, conditioned for the faithful and honest discharge of his duties and for the faithful application of all moneys, funds and valuables which shall come into his possession, or under his control.”
(Sec. 3239, Rem. Comp. Stats. 1922.)

The following cases cited do not support the contention for the reason that the bonds in these cases were held enforceable in spite of the provisions therein contained, outside of, or at variance with the statute:

U. S. vs. Hodson, 10 Wall. 395;

Stephenson vs. Monmouth Min. & Mfg. Co., 84 Fed. 114;

Puget Sound State Bank vs. Gallucci, 82 Wash. 445;

L. R. A. 1917B, 977.

Section 777, Remington's Compiled Statutes, 1922, provides:

“No bond required by law, and intended as such bond, shall be void for want of form or substance, recital, or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such

defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond.” (p. 555.)

There is no substantial difference between the conditions of the bonds sued on in the present case and the conditions required by the statute. Although the first bond was given before the enactment of the statute, it is clear that it was treated by the parties to it, after that enactment, in continuing the bond in force, as a compliance with the statute.

Defendant further contends:

“That the bank, long prior to the losses complained of here, had breached the warranties in consideration of which these common law obligations of the defendant were executed, and that therefore, by the terms of the bonds themselves, there is no liability here on any of the items claimed.”

Having held both bonds the equivalent of statutory bonds, after the Washington enactment of 1917, consideration of the question of breach of warranty appears unnecessary, but it is not meant to [72] concede that a breach of warranty has been shown.

The statute of 1917 prohibits the loaning of money to officers of the bank without authority from the Board of Directors, its language being as follows:

“No bank or trust company shall, nor shall any officer or employee thereof on behalf of such corporation, directly or indirectly, loan

any sum of money to any director, officer or employee of such corporation, unless a resolution authorizing the same and approved by a majority of the directors, at a meeting at which no director, officer or employee to whom the loan is to be made shall be present, shall be entered in the corporate minutes.

“Every director and officer of any bank or trust company who shall borrow or shall knowingly permit any of its directors, officers or employees to borrow, any of its funds in an excessive amount or in violation of the provisions of this section, shall be personally liable for any loss or damage which the corporation, its shareholders or any person may sustain in consequence thereof, and shall also be guilty of a felony.” (Sec. 3259, Rem. Comp. Stats. of Wash. 1922.)

It is argued that a breach of warranty is shown because the certificates given upon the renewal were not in fact true and, because of the failure to notify the defendant of Stewart's dishonest acts. If it be conceded that the President and Vice-president had authority to give the certificates for the bank, yet no fraud is shown to have entered into the statements contained therein. The formal certificates already quoted, provide:

“To Fidelity and Deposit Company of Maryland:

THIS IS TO CERTIFY, That since the issue of the above bond Mr. F. L. Stewart has faithfully, honestly and punctually accounted to me for all money and property in his control or custody as

my Employee, has always had proper securities and funds on hand to balance his accounts, and is not now in default to me.

Dated April 23, 1914.

KELSO STATE BANK,

F. M. CAROTHERS,

Pres.

(Sgd.) WALTER N. SMITH,

Witness.”

While the directors and other officers of the bank may have negligently performed their duty (a question not to be considered or determined in this suit), there is no evidence of fraud on [73] their part, or intentional concealment from the defendant of any material fact.

It is clear that the certificate is not one of facts of a definite or specific nature. It is primarily made up of conclusions, and those partly of law, and the fact that the certifying officer was mistaken will not defeat recovery. These certificates do not amount to a warranty. The only reasonable interpretation to be put upon the certificate is that the officer certifying believed to be true the facts represented. To give it the effect of a warranty would be to hold that the bank had underwritten its own security. Even if the power to give such a warranty after the Act of 1917 were conceded in the case of such a bond, yet to so hold would be wholly unreasonable. If it were so understood, the defendant would have taken, at the same time, a release from liability for prior transactions. That it did not do so shows that it under-

stood the statements of the certifying officer as representations by the latter of his belief based upon such knowledge as he then had.

American Surety Co. vs. Pauly (No. 2) 170 U. S. 173;

Fidelity & Deposit Co. vs. Courtney, 186 U. S. 342;

Title Guaranty & Surety Co. vs. Nichols, 224 U. S. 346;

Remington vs. Fidelity & Deposit Co., 27 Wash. 429.

In Guarantee Co. vs. Mechanics etc. Co. (183 U. S. 402), the bank's books showed understated liability of the teller and also showed amounts extracted from bills receivable, both of which facts could have been detected by a trial balance or comparison of the books kept by the teller and the individual ledger kept by another. The bank was held to a charge of laches.

This case is not in point for the reason that, in the instant case, Stewart's fraud was extraneous, in the main, at least to the books and records of the bank.

Roberts vs. Washington National Bank (11 Wash. 550 at 558) [74] and Poultry Producers Union vs. Williams (58 Wash. 64 at 69), are distinguishable from the present case in the same way as Guarantee Co. vs. Mechanics' etc. Co. (*supra*).

It is further contended

“That in none of the items claimed has the bank sustained any loss because of dishonesty on the part of Mr. Stewart, the cashier”; and

“That each and all of the matters and things complained of were ratified by the Kelso State Bank.”

The evidence showed the bank insolvent for years and during the times of the transactions in question. This fact Mr. Stewart must have known and it further showed that there was no resolution by the Board of Directors authorizing or approving the loans in question. It is clearly shown that the cashier, Stewart, dominated the bank; that it and its policy and management were almost entirely controlled by him and that the officers of the bank had confidence in him. It does not appear that, in view of these circumstances, an ordinary examination of the books and affairs of the bank would have disclosed the nature or extent of the dishonest practices and transactions. The dishonesty of Stewart on these transactions was not shown by the books, alone, but, to be comprehended, required knowledge only to be otherwise obtained. The directors not having been shown to possess such knowledge, no ratification is shown.

First National Bank of Pullman vs. Gaddis (31 Wash. 596) and Roberts vs. Washington National Bank (11 Wash. 550), as understood by me, do not hold otherwise.

In the matter of ratification and the kindred doctrine of estoppel, no two cases can be exactly alike. Each depends upon its own circumstances. In these two Washington cases there is nothing to show such dominating control of the bank by the bonded officer as Stewart is shown to have exer-

cised. Both of these cases were decided prior to the Act of 1917 providing punishment for an officer borrowing without authority of the directors. [75]

State vs. Larson, 19 Wash. Dec., p. 148.

In view of this statute and the fact that the bank was at all times in question insolvent, coupled with the material interest of Stewart in the various enterprises to which the bank's money was loaned and the at least very questionable solvency of such enterprises and the consequently very doubtful value of the paper taken, there is no room to indulge the presumption that the loans were made in the exercise of any honest judgment on Stewart's part. None of the other questions raised and argued—all of which have been considered—change in any way the conclusion reached. This leaves for consideration the items and the amount thereof for which plaintiff is entitled to recover.

Recovery will be allowed on account of the bank's loss in the matter of the four Shepherd notes, for which Stewart took credit, in the amount of \$3,200. Recovery will also be allowed on account of the bank's loss in the matter of the Northwest Transportation Company's transactions, in the amount of \$5,854.78. Recovery will be allowed on account of the bank's loss in the matter of the Kruse notes in the amount of \$4,880. The reporter's notes, page 78, recite:

“Other side (referring to cage book of Stewart) there is a credit, F. L. Stewart, under title of Individual deposits, in Stewart's handwriting, \$1,880.”

This is evidently the reporter's mistake and should be \$4,880.

Recovery will be allowed on account of the bank's loss in the matter of the so-called Fisk "dummy" note, in the amount of \$6,250. Recovery will be allowed on account of the bank's loss on the Phillips notes, in the amount of \$4,050. Stewart received \$67.90 at one time and \$38.70 at another as commission on account of policies of life insurance taken out by Phillips and placed with the bank as security for certain notes. If all of the Phillips' transactions are treated as tainted because of Stewart's interest and profit, doubtless recovery on account of these items should be allowed, but there were Phillips notes that appear to have been paid. The [76] policies of insurance were, presumably, good collateral and, being one of the instances where something was really done to protect the bank, no recovery will be allowed because of these two items claimed.

Recovery will be allowed on account of the bank's loss in the matter of the Kelso Farm Company, in the sum of \$5,950. Recovery will be allowed because of the bank's loss on the Richter warrants, in the amount of \$2,000. The fact that Stewart was an administrator of the estate owning the warrants which he sold to the bank and took credit personally does not by reason of the fact of his breach of trust as administrator take this item out of those transactions for which the defendant is liable. It may have been double dishonesty on Stewart's part, but in it was included his dishon-

esty as cashier, for, when he, as cashier for the bank, took from himself, as administrator of the estate, warrants of the estate and gave himself personal credit, his dishonest act as cashier was the necessary conduit for the conveyance of the value of the property from the estate to Stewart. Or, if it be considered that Stewart stole the warrants from the estate and sold them to the bank, Stewart, as cashier, was dishonest when he bought stolen property, particularly when he availed himself of the proceeds.

The total amounts above allowed exceeding the amount of the bond, render it unnecessary to consider further items of loss claimed. Whether interest should be allowed and, if so, from what date, will be considered upon the signing of the judgment. [77]

Defendant's Proposed Findings.

Comes now the above-named defendant and proposes the attached findings of fact and conclusions of law in this case and requests that the Court adopt said findings as the findings of the Court.

GRINSTEAD, LAUBE & LAUGHLIN,

And THOMAS E. DAVIS,

Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Apr. 2, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [78]

Findings of Fact and Conclusions of Law.

This cause coming on to be heard on the 24th day of October, 1922, before Honorable Edward E. Cushman, District Judge, sitting without a jury, a jury having been expressly waived by written stipulation of the parties, filed herein, the plaintiff appearing by his attorneys, Messrs. Miller, Wilkinson & Miller and the defendant appearing by its attorneys, Grinstead & Laube and Thomas E. Davis, and witnesses having been sworn and testified on behalf of the plaintiff and the defendant and said case having been submitted to the Court and by the Court taken under advisement, and written briefs having been furnished the Court by respective counsel herein, the Court, being fully advised in the premises, makes the following:

FINDINGS OF FACT.**I.**

That the Kelso State Bank was at all times mentioned in the complaint of plaintiff a corporation organized under the laws of the State of Washington, engaged in the general banking business at Kelso, Washington, and that F. L. Stewart was at all times mentioned in said complaint the cashier of said bank.

II.

That said Kelso State Bank became insolvent and was closed [79] by the banking department of the State of Washington on the seventeenth day of March, 1921. That plaintiff is the supervisor of banking of the State of Washington and is, and

since said seventeenth day of March, 1921, has been, in charge of administering the assets of the said bank, and that plaintiff is, and at all times mentioned herein was, a citizen of the State of Washington.

[Allowed.]

III.

That the defendant is, and at all times mentioned in plaintiff's complaint was, a corporation organized and existing under the laws of the State of Maryland and a citizen of said state authorized to do and doing business in the State of Washington as a surety company.

[D.]

IV.

That, on the twenty-seventh day of April, 1911, F. L. Stewart, as principal, and the American Bonding Company of Baltimore, as surety, executed a certain bond to the Kelso State Bank, conditioned that said American Bonding Company, as surety, and said F. L. Stewart, as principal, would reimburse said Kelso State Bank for any pecuniary loss which it might suffer by reason of the dishonest acts of the said F. L. Stewart. That said bond was executed by said American Bonding Company in reliance upon certain statements furnished by said Kelso State Bank to said company, a copy of which statements is attached to defendant's answer herein as Exhibit "C." That said bond so executed by said bonding company was annually renewed and continued in force until the first day of May, 1913, at which time the defendant herein,

having purchased all of the assets and assumed all of the liabilities of the American Bonding Company and having succeeded to the interests of said American Bonding Company on the twenty-fourth day of April, 1913, executed a certain bond effective from May 1, 1913, in the penal sum of twenty-five thousand and No/100 [80] (\$25,000.00) Dollars in favor of the Kelso State Bank. That said bond was furnished upon the written agreement of said Kelso State Bank that the information previously furnished by said Kelso State Bank to the American Bonding Company regarding said F. L. Stewart, his duties and employment and the supervision exercised over the work and accounts of said F. L. Stewart should be warranties and form a part of any bond executed to said Kelso State Bank covering said F. L. Stewart and of any continuation thereof. That a true copy of said agreement is attached to defendant's answer herein as Exhibit "D" and the original is in evidence. That said bond, executed by the defendant on the twenty-fourth day of April, 1913, was annually renewed and was kept in force until the first day of May, 1920. That each of said renewals was made pursuant to a certificate of said Kelso State Bank, copies of which are attached to defendant's answer herein as Exhibits "E," "F," "G," "H," "I" and "J." That, on April 26th, 1920, said defendant, as surety, and said F. L. Stewart, as principal, executed and delivered to the Kelso State Bank a certain bond, a copy of which is attached to defendant's answer as Exhibit "B."

That said bond, dated April 26, 1920, was executed in reliance upon a certain certificate of said Kelso State Bank, dated April 26th, 1920, a copy of which is attached to defendant's answer herein and marked Exhibit "K."

[D.]

V.

That, on or about the ninth day of June, 1921, the plaintiff filed a claim with the defendant on account of alleged wrongful acts of said F. L. Stewart, listing in said claim, forty-nine (49) separate transactions wherein the Kelso State Bank claimed to have suffered loss by reason of dishonest acts of said cashier, aggregating the sum of Fifty-four Thousand Three Hundred Ninety-four and 97/100 (\$54,394.97) Dollars.

[A.] [81]

VI.

That, during the trial of this case, all of the items on which claim was made either were waived or there was no evidence introduced to support the same, except those hereinafter mentioned:

One note executed by Frank Shepard to the Kelso State Bank, which entered the Bank April 23, 1920, in the amount of \$1,000.00.

One note executed by Frank Shepard to the Kelso State Bank, which entered the Bank July 19, 1920, in the amount of \$1,000.00.

One note executed by Frank Shepard to the Kelso State Bank, which entered the Bank August 13, 1920, in the amount of \$1,000.00.

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One note executed by Frank Shepard to the Kelso State Bank, which entered the Bank August 13, 1920, in the amount of \$1,000.00.

One note executed by the Northwest Transportation Company, which entered the Bank April 3, 1920, in the amount of \$2,500.00.

One note executed by the Northwest Transportation Company, which entered the Bank September 1, 1920, in the amount of \$2,104.78.

One note executed by the Northwest Transportation Company, which entered the Bank March 10, 1921, in the amount of \$450.00.

One note executed by the Northwest Transportation Company, which entered the Bank March 10, 1921, in the amount of \$800.00.

One note executed by Fritz Kruse, which entered the Bank September 10, 1920, in the amount of \$4,880.00.

One note, referred to as the Fisk (dummy note), which entered the Bank January 19, 1921, in the amount of \$6,250.00, on which claim was made in the claim filed and in the complaint for the sum of \$5,000.00.

One note of H. D. Phillips, which entered the Bank March 20, 1918, in the amount of \$1,500.00.

One note of H. D. Phillips, which entered the Bank March 20, 1918, in the amount of \$1,500.00.

One note of H. D. Phillips, which entered the Bank March 20, 1918, in the amount of \$550.00.

One note of H. D. Phillips, which entered the Bank April 11, 1918, in the amount of \$500.00.

One note executed by the Kelso Farm Company, dated January 12, 1921, in the amount of \$2,200.00. [82]

One note executed by the Kelso Farm Company, which entered the Bank February 15, 1921, in the amount of \$3,750.00.

[A.]

VII.

That, in addition to the notes mentioned in the foregoing paragraph, the plaintiff, in his complaint, sought recovery against the defendant for the sum of Two Thousand and No/100 (\$2,000.00) Dollars on account of transactions arising out of certain warrants alleged to have been taken from the Richter estate, of which F. L. Stewart was administrator. That no claim was made on account of the loss arising out of these warrants prior to the filing of plaintiff's complaint herein.

[A.]

VIII.

That the bond, in force at the time of the alleged loss on account of said Richter estate warrants, contained the following provisions:

“In the event of death of the employee (F. L. Stewart) during the term of this bond, or his suspension, dismissal or retirement from the service of the employer during the said term, this bond shall thereupon terminate without any action on the part of the surety. The right to make a claim hereunder shall cease at the end of six (6) months after the termination, expiration or cancellation of this bond.

Upon discovery by the employer of any dis-

honest act on the part of the employee, the employer shall, at the earliest practicable moment and, at all events, not later than five (5) days after such discovery, give written notice thereof to the surety at its home office. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the Surety at its home office within three (3) months after such discovery. Legal proceedings for recovery hereunder may not be brought until three (3) months have elapsed after such proof of loss has been filed with the Surety."

IX.

That F. L. Stewart, cashier of said Kelso State Bank, disappeared or committed suicide on the 17th day of March, 1921. That plaintiff's complaint was not filed and no notice was given to said Surety of any claim on account of the loss in connection [83] with the Richter estate warrants until October 28, 1921. That plaintiff was aware of the loss on account of these warrants more than three (3) months prior to said twenty-eighth day of October, 1921.

X.

That the four (4) notes of Frank Shepard, in the amount of One Thousand and No/100 (\$1,000.00) Dollars each, hereinbefore mentioned, were executed under the following conditions:

Mr. Shepard had purchased from Mr. Stewart an undivided one-half ($\frac{1}{2}$) interest in a certain steamboat known as the Steamer "Olympia," giv-

ing fourteen (14) notes in the principal sum of One Thousand and No/100 (\$1,000.00) Dollars each in payment thereof, which notes were made payable to the Kelso State Bank and entered the Bank on March 5, 1920. That six (6) of said notes, in the amount of One Thousand and No/100 (\$1,000.00) Dollars each, were discounted by said Kelso State Bank with the United States National Bank of Portland. That, as said notes so discounted with the United States National Bank of Portland became due, Frank Shepard failed to pay the same and said F. L. Stewart executed his checks in the amount of One Thousand and No/100 (\$1,000.00) Dollars each to said United States National Bank in payment of said notes. That, upon executing said checks, said F. L. Stewart sent the same to said Frank Shepard in Portland and Frank Shepard, pursuant to instructions of F. L. Stewart, took said checks to the United States National Bank and paid said notes, Shepard paying the interest. That, thereupon, said Frank Shepard executed four (4) notes in the sum of One Thousand and No/100 (\$1,000.00) Dollars each, payable to the Kelso State Bank, and forwarded the same to said Bank, and the proceeds thereof were deposited to the account of F. L. Stewart to reimburse him for the amount which he had paid the United States National Bank. That said new notes are the notes above [84] mentioned and entered the Bank on the date above mentioned.

[A.]

XI.

That said new notes so executed by said Shepard were thereafter renewed by said Kelso State Bank and, at the time said Bank closed, there remained in said bank notes executed by Frank Shepard in the sum of Four Thousand and No/100 (\$4,000.00) Dollars. That plaintiff herein, settled with said Frank Shepard for the sum of twenty (20) cents on the dollar and surrendered the notes remaining in said bank at the time it closed to said Shepard as fully paid. That Shepard was worth over \$50,000 at the time of the execution of the notes, and there is no evidence as to his financial condition at the time said settlement was made or that it was impossible or impracticable to collect from him in full for the notes which remained in the Kelso State Bank at the time it closed.

[D.]

XII.

That the Northwest Transportation Company note for Twenty-five hundred and No/100 (\$2,500.00) Dollars, dated April 3, 1920, was a note executed by the Northwest Transportation Co., to F. L. Stewart for a loan which Mr. Stewart made said transportation company. That said note was discounted by Mr. Stewart with the Kelso State Bank and the proceeds were deposited in the account of Mr. Stewart in said bank. The Northwest Transportation Company note of September 1, 1920, was a note for Five Thousand and No/100 (\$5,000.00) Dollars executed by the North-

west Transportation Company to the Kelso State Bank, the proceeds of which, in excess of Twenty-one Hundred Four and 78/100 (\$2104.78) Dollars, were used in paying insurance, interest and revenue stamps. The sum of Twenty-one Hundred Four and 78/100 (\$2104.78) Dollars was deposited to the credit of F. L. Stewart. Prior to the time this note was executed, F. L. Stewart had paid debts of the Northwest Transportation Company amounting to more than the amount deposited to his credit out of the proceeds of said note. [85]

XIII.

That the two items of March 10, 1921, for Four Hundred Fifty and No/100 (\$450.00) Dollars and Eight Hundred and No/100 (\$800.00) Dollars, respectively, were items deposited to the credit of F. L. Stewart out of the proceeds of a Twelve Hundred Fifty and No/100 (\$1250.00) Dollars note executed by the Northwest Transportation Company to the Kelso State Bank. On January 19, 1921, F. L. Stewart deposited the sum of Twelve Hundred Fifty and No/100 (\$1250.00) Dollars to the credit of the Northwest Transportation Company, and the note for Twelve Hundred Fifty and No/100 (\$1250.00) was given to reimburse him for the amount of such deposit.

[A.]

XIV.

That all of the Northwest Transportation Company notes, except the note of March 10, 1921, were renewed at various times, interest was collected on the same and the same were kept at all times in

their regular place in the files of the Kelso State Bank. That the assistant cashier and other officers of the Bank knew of said notes and that the Northwest Transportation Company was borrowing from said Kelso State Bank and ratified said loans.

[A. except last sentence.]

XV.

That all of the notes executed by the Northwest Transportation Company were secured by a chattel mortgage on a steamboat, which chattel mortgage plaintiff foreclosed. The mortgaged property was sold at execution sale and the proceeds of said sale were received and retained by plaintiff.

XVI.

That, on September 10, 1920, Fritz Kruse executed a note to the Kelso State Bank in the sum of Five Thousand and No/100 ((\$5,000.00) Dollars, of which amount Forty-Eight Hundred Eighty and No/100 (\$4,880.00) Dollars was deposited to the credit of [86] F. L. Stewart. That this note was later returned to Fritz Kruse as paid. That, thereafter, Fritz Kruse executed two (2) notes to the Kelso State Bank in the sum of Twenty-Five Hundred and No/100 (\$2,500.00) Dollars each, which notes were in the Bank at the time the Bank closed. That no claim has been made on account of the two (2) notes last above mentioned.

[D.]

XVII.

That, on January 19, 1921, F. L. Stewart placed a note, which was not executed but in lieu of execution contained the notation "to be signed by T.

P. Fisk," in the Kelso State Bank. That said note in the amount of Sixty-Two Hundred Fifty and No/100 (\$6,250.00) Dollars and of the proceeds thereof, the sum of Five Thousand and No/100 (\$5,000.00) Dollars was credited to the account of F. L. Stewart, and the sum of Twelve Hundred Fifty and No/100 (\$1,250.00) Dollars was used in payment of a note held by the Bank previously executed by the Northwest Transportation Company. That said note had attached to it a certain contract entered into between F. L. Stewart, T. P. Fisk and other parties, on which contract F. L. Stewart had advanced for T. P. Fisk's benefit the sum of Sixty-Two Hundred Fifty and No/100 (\$6,250.00) Dollars, and said T. P. Fisk had agreed that he would sign said note to said Kelso State Bank for said Sixty-Two Hundred Fifty and No/100 (\$6,250.00) Dollars if it embodied the terms of said contract which was attached thereto. That said note was not signed by T. P. Fisk prior to the time said Bank closed. That, in the claim filed with the defendant herein, and in the pleadings herein, claim is made against the defendant on account of this transaction for the sum of Five Thousand and No/100 (\$5,000.00) Dollars.

[D.]

XVIII.

That, in March, 1918, one H. D. Phillips purchased a farm from F. L. Stewart, and in partial payment thereof executed two [87] (2) notes in the sum of Fifteen Hundred and No/100 (\$1,500.00) Dollars each. These notes passed into the Kelso

State Bank and the proceeds thereof were used in payment of a cash item which was initiated on March 11, 1918. And on March 20, 1918, said Phillips executed a note for Five Hundred Fifty and No/100 (\$550.00) Dollars to the Kelso State Bank, of which amount Fifty and No/100 (\$50.00) Dollars was credited to the account of F. L. Stewart. On April 11, 1918, said Phillips executed a note to the Kelso State Bank in the sum of Fifteen Hundred and No/100 (\$1,500.00) Dollars, of which amount Five Hundred and No/100 (\$500.00) Dollars was credited to the account of F. L. Stewart. That the notes executed by said Phillips were secured by a mortgage on said farm purchased by Phillips from Stewart.

[A. except last sentence.]

XIX.

That the Kelso Farm Company was a trade name under which F. L. Stewart was operating a farm owned by him. That, on January 12, 1921, F. L. Stewart borrowed from the Kelso State Bank Twenty-Two Hundred and No/100 (\$2,200.00) Dollars on a note executed by said Kelso Farm Company, which note was carried as a cash item until February 18, 1921, when it passed into the records of the Bank. That, on February 15, 1921, the Kelso Farm Company executed a note to the Bank in the sum of Thirty-seven Hundred Fifty and No/100 (\$3,750.00) Dollars, which amount was credited to the account of F. L. Stewart in said Bank. That, on January 11, 1921, the Board of Directors of the Kelso State Bank authorized a loan to

F. L. Stewart in the amount of Six Thousand and No/100 (\$6,000.00) Dollars, and there was no loan made to him or note of his placed in said Bank after said date, except said two notes of the Kelso Farm Company.

[Allowed except last sentence.]

XX.

That, in all of the transactions between F. L. Stewart and [88] (2) notes in the sum of Fifteen Hundred and No/100 (\$1,500.00) Dollars each. These notes passed into the Kelso State Bank and the proceeds thereof were used in payment of a cash item which was initiated on March 11, 1918. And on March 20, 1918, said Phillips executed a note for Five Hundred Fifty and No/100 (\$550.00) Dollars to the Kelso State Bank, of which amount Fifty and No/100 (\$50.00) Dollars was credited to the account of F. L. Stewart. On April 11, 1918, said Phillips executed a note to the Kelso State Bank in the sum of Fifteen Hundred and No/100 (\$1,500.00) Dollars, of which amount Five Hundred and No/100 (\$500.00) Dollars was credited to the account of F. L. Stewart.

[A. except last sentence.]

XIX.

That the Kelso Farm Company was a trade name under which F. L. Stewart was operating a farm owned by him. That, on January 12, 1921, F. L. Stewart borrowed from the Kelso State Bank Twenty-Two Hundred and No/100 (\$2,200.00) Dollars on a note executed by said Kelso Farm Company, which note was carried as a cash item

until February 18, 1921, when it passed into the records of the bank. That, on February 15, 1921, the Kelso Farm Company executed a note to the bank in the sum of Thirty-Seven Hundred Fifty and No/100 (\$3,750.00) Dollars, which amount was credited to the account of F. L. Stewart in said bank. That on January 11, 1921, the Board of Directors of the Kelso State Bank authorized a loan to F. L. Stewart in the amount of Six Thousand and No/100 (\$6,000.00) Dollars, and there was no loan made to him or note of his placed in said bank after said date, except said two notes of the Kelso Farm Company.

[Allowed except last sentence.]

XX.

That, in all of the transactions between F. L. Stewart and [89] the Kelso State Bank, relative to the notes and items hereinbefore mentioned, there was no attempt on the part of F. L. Stewart to deceive or mislead the officers of the Kelso State Bank or to conceal the records of the transactions. That, in every one of said transactions, the records of the Kelso State Bank clearly showed the exact nature of the transactions. That all of said transactions were known to the assistant cashier of the bank and to the other officers. That all of said notes were posted in the discount register by the assistant cashier of the bank, who was the son-in-law of the president of the bank. That said bank always dealt with said notes as its own, collected interest on the same, accepted renewals of the same when they became due, and plaintiff, after

taking possession of said bank, settled with Frank Shepard on the notes he had made, and foreclosed the chattel mortgage given to secure the notes of the Northwest Transportation Company. That the Bank Examiner of the State of Washington knew that the bank held the notes of Frank Shepard, the Northwest Transportation Company, Fritz Kruse and H. D. Phillips and had at various times criticised loans to these parties.

[D.]

XXI.

That the directors of said Bank, from time to time, and officers of the bank, other than F. L. Stewart, borrowed money from said bank for a period of many years without any formal resolution of the Board of Directors authorizing said loans. That said F. L. Stewart, for many years prior to the seventeenth day of March, 1921, had personally borrowed money from said bank at various times on his individual notes, of which fact the directors had full knowledge, and that said loans were repaid by him to said bank, and that there was never any resolution of the Board of Directors authorizing said loans, except said resolution of January 11, 1921. That said F. L. Stewart had many times, [90] previous to the loans herein mentioned, to the Kelso Farm Company, borrowed money from said bank on notes executed in the name of said Kelso Farm Company without any formal authorization by the Board of Directors, and repaid said loans, of all of which the directors had full knowledge.

[D.]

XXII.

That no notice was ever given to the defendant, prior to the closing of said Kelso State Bank, relative to any of the transactions alleged in plaintiff's complaint herein, and said defendant was never notified of the transactions relative to certain warrants belonging to the Richter estate on which claim is based in plaintiff's complaint, in the sum of Two Thousand and No/100 (\$2,000.00) Dollars, prior to the filing of said complaint.

[D.]

XXIII.

That there is no evidence that said F. L. Stewart ever withdrew any of the money credited to his account in the Kelso State Bank from said bank, or that he ever profited by any of the transactions mentioned in plaintiff's complaint.

[D.]

XXIV.

That, prior to the time said Kelso State Bank closed, the defendant, as surety, and the Kelso State Bank, as principal, executed two certain depository bonds in the penal sums of Forty Thousand and No/100 (\$40,000.00) Dollars, and Ten Thousand and No/100 (\$10,000.00) Dollars, respectively, to Linus Perry Brown, as County Treasurer of Cowlitz County, Washington, to secure deposits of county funds made by said county treasurer in said Kelso State Bank. That, at the time said bank closed, said Linus Perry Brown had on deposit in said bank the sum of Sixty-Four Thousand Four Hundred Sixty and 96/100 (\$64,460.96) Dollars, of

which sum Forty-Six Thousand One Hundred Sixty-Three and 29/100 (\$46,163.29) Dollars was secured by said depository bonds executed by said defendant, as surety, and said Kelso State Bank, [91] as principal; that the defendant was obliged to pay and did pay said county treasurer said sum of Forty-Six Thousand One Hundred Sixty-Three and 29/100 (\$46,163.29) Dollars, and that no part of this sum has been paid said defendant by the Kelso State Bank, except dividends amounting to twenty (20%) per cent, and that there is a balance due and owing from said Kelso State Bank and from the plaintiff herein as supervisor of banking in charge of and liquidating said Kelso State Bank to the defendant of Thirty-Nine Thousand Nine Hundred Thirty and 63/100 (\$39,930.63) Dollars.

[A. in place of Plffs. VIII.]

XXV.

That the statements made to the defendant and to its predecessors in interest by said Kelso State Bank, for the purpose of securing the fidelity bonds on which this suit is brought, were not true, and the promissory warranties contained in the said statements were breached by said Kelso State Bank, in that the securities were not inventoried every week by some officer other than said F. L. Stewart, as agreed, notice was not given to the defendant in accordance with the provisions of the bonds executed by said defendant and the annual renewal certificates given by said Kelso State Bank for the purpose of obtaining renewals of said bonds, were false.

[D.]

Done in open court this —— day of ——, A. D.
1923.

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Apr. 2, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [92]

From the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That the plaintiff is not entitled to recover from the defendant any sum or sums whatsoever, and the defendant is entitled to have plaintiff's complaint dismissed and to recover its costs and disbursements herein.

[D.]

II.

That, as to any amounts which plaintiff might otherwise be entitled to recover, the defendant is entitled to have setoff against the indebtedness which the plaintiff owes it on account of the depository bonds mentioned in the Findings of Fact.

[D.]

Done in open court this —— day of ——, A. D.
1923.

Judge. [93]

The foregoing proposed findings of fact and conclusions of law were duly presented to and con-

sidered by the court prior to the signing of the findings of fact and conclusions of law in favor of the plaintiff. Defendant's counsel at the time duly excepted to the Court's refusal to adopt the proposed findings in favor of defendant, and exception to said ruling is hereby allowed the defendant.

Done in open court this —— day of March, A. D. 1923.

Judge. [94]

Findings of Fact and Conclusions of Law.

This cause coming on to be heard on the 24th day of October, 1922, before Honorable Edward E. Cushman, District Judge, sitting without a jury, a jury having been expressly waived by written stipulation of the parties, filed herein, the plaintiff appearing by his attorneys, Messrs. Miller, Wilkinson & Miller, and the defendant appearing by its attorneys, Grinstead & Laube and Thomas E. Davis, and witnesses having been sworn and testified on behalf of the plaintiff and the defendant and said case having been submitted to the Court and by the Court taken under advisement, and written briefs having been furnished the Court by respective counsel herein, the Court, being fully advised in the premises, makes the following

FINDINGS OF FACT.

I.

That the Kelso State Bank was at all times mentioned in the complaint of plaintiff a corporation

organized under the laws of the State of Washington, engaged in the general banking business at Kelso, Washington, and that F. L. Stewart was at all times mentioned in said complaint the Cashier of said bank.

II.

That said Kelso State Bank became insolvent and was closed by [95] the banking department of the State of Washington on the seventeenth day of March, 1921. That plaintiff is the supervisor of banking of the State of Washington and is, and since said seventeenth day of March, 1921, has been, in charge of administering the assets of the said bank, and that plaintiff is, and at all times mentioned herein was, a citizen of the State of Washington.

III.

That the defendant is, and at all times mentioned in plaintiff's complaint was, a corporation organized and existing under the laws of the State of Maryland and a citizen of said state authorized to do and doing business in the State of Washington as a surety company.

IV.

That, on the twenty-seventh day of April, 1911, the American Bonding Company of Baltimore executed and delivered to the Kelso State Bank its bond conditioned that said Bonding Company, as surety, and F. L. Stewart, as principal, would reimburse the Kelso State Bank for any pecuniary loss which the bank might suffer by reason of the dishonest acts of said F. L. Stewart while acting as cashier of said bank; that said bond was continued

in force until the fourteenth day of April, 1913, when this defendant executed and delivered to the Kelso State Bank Bond No. 886,520 for the sum of Twenty-five Thousand and No/100 (\$25,000.00) Dollars guaranteeing the Kelso State Bank for pecuniary loss of money, securities or other personal property sustained by any dishonest act or acts committed by the said F. L. Stewart as cashier of the said Kelso State Bank; that such guarantee bond was accepted by the Kelso State Bank as a guarantee against loss sustained by the dishonest acts of the said F. L. Stewart as such cashier.

V.

That, at the expiration of the said bond No. 886,520 mentioned and referred to, it was annually renewed and continued in force [96] until the first day of May, 1920, and on said first day of May, 1920, Bond No. 886,520-A was issued to the said Kelso State Bank indemnifying the Kelso State Bank for any fraud, dishonesty, forgery, theft, embezzlement or wrongful abstraction of F. L. Stewart while in the employ of the said Kelso State Bank as such cashier, said bond covering the period of one year from the first day of May, 1920.

VI.

That, on or about the ninth day of June, 1921, the plaintiff filed a claim with the defendant on account of alleged wrongful acts of said F. L. Stewart, listing in said claim forty-nine (49) separate transactions wherein the Kelso State Bank claimed to have suffered loss by reason of dishonest acts of said cashier, aggregating the sum of Fifty-four

Thousand Three Hundred Ninety-four and 97/100 (\$54,394.97) Dollars.

VII.

That, during the trial of this case, all of the items on which claim was made either were waived or there was no evidence introduced to support the same, except those hereinafter mentioned:

One note executed by Frank Shepard to the Kelso State Bank, which entered the bank April 23, 1920, in the amount of \$1000.00.

One note executed by Frank Shepard to the Kelso State Bank, which entered the bank July 19, 1920, in the amount of \$1000.00.

One note executed by Frank Shepard to the Kelso State Bank, which entered the bank August 13, 1920, in the amount of \$1000.00.

One note executed by Frank Shepard to the Kelso State Bank, which entered the bank August 13, 1920, in the amount of \$1000.00.

One note executed by the Northwest Transportation Company, which entered the bank April 3, 1920, in the amount of \$2500.00.

One note executed by the Northwest Transportation Company, which entered the bank September 1, 1920, in the amount of \$2104.78. [97]

One note executed by the Northwest Transportation Company, which entered the bank March 10, 1921, in the amount of \$450.00.

One note executed by the Northwest Transportation Company, which entered the bank March 10, 1921, in the amount of \$800.00.

One note executed by Fritz Kruse, which entered

the bank September 10, 1920, in the amount of \$4880.00.

One note, referred to as the Fisk (dummy note), which entered the bank January 19, 1921, in the amount of \$6250.00, on which claim was made in the claim filed and in the complaint for the sum of \$5000.00.

One note of H. D. Phillips, which entered the bank March 20, 1918, in the amount of \$1500.00.

One note of H. D. Phillips, which entered the bank March 20, 1918, in the amount of \$1500.00.

One note of H. D. Phillips, which entered the bank March 20, 1918, in the amount of \$550.00.

One note of H. D. Phillips, which entered the bank April 11, 1918, in the amount of \$500.00.

One note executed by the Kelso Farm Company, dated January 12, 1921, in the amount of \$2200.00.

One note executed by the Kelso Farm Company, which entered the bank February 15, 1921, in the amount of \$3750.00.

VIII.

That, in addition to the notes mentioned in the foregoing paragraph, the plaintiff, in his complaint, sought recovery against the defendant for the sum of Two Thousand and No/100 (\$2000.00) Dollars on account of transactions arising out of certain warrants alleged to have been taken from the Richter estate, of which F. L. Stewart was administrator; that no claim was made on account of the loss arising out of these warrants prior to the filing of plaintiff's complaint herein.

IX.

That by reason of the dishonest, illegal and fraudulent acts of said F. L. Stewart during the year 1920, and while Bond No. 886,520 was in force and while said F. L. Stewart was the Cashier of said Kelso State Bank the bank suffered a pecuniary loss of money and [98] securities as follows:

Through notes given by Frank Shepard to the said F. L. Stewart and discounted by the said F. L. Stewart while Cashier of the said Kelso State Bank, said notes growing out of a transaction in which Stewart and Shepard were jointly interested, and the bank thereby losing through the dishonest and illegal acts of said F. L. Stewart, the sum of Thirty-two Hundred and No/100 (\$3200.00) Dollars.

X.

That the four (4) notes of Frank Shepard, in the amount of One Thousand and No/100 (\$1000.00) Dollars each, hereinbefore mentioned, were executed under the following conditions:

Mr. Shepard had purchased from Mr. Stewart an undivided one-half ($\frac{1}{2}$) interest in a certain steamboat known as the steamer "Olympia," giving fourteen (14) notes in the principal sum of One Thousand and No/100 (\$1000.00) Dollars each in payment thereof, which notes were made payable to the Kelso State Bank and entered the bank on March 5, 1920. That six (6) of said notes, in the amount of One Thousand and No/100 (\$1000.00) Dollars each, were discounted by said Kelso State Bank with the United States National Bank of Portland. That, as said notes so discounted with the United States National Bank of Portland be-

came due, Frank Shepard failed to pay the same and said F. L. Stewart executed his checks in the amount of One Thousand and No/100 (\$1000.00) Dollars each to said United States National Bank in payment of said notes. That, upon executing said checks, said F. L. Stewart sent the same to said Frank Shepard in Portland and Frank Shepard, pursuant to instructions of F. L. Stewart, took said checks to the United States National Bank and paid said notes, Shepard paying the interest. That, thereupon, said Frank Shepard executed four (4) notes in the sum of One Thousand and No/100 (\$1000.00) Dollars each, payable to the Kelso State Bank, and forwarded the same to said bank, and the proceeds thereof were deposited to the account of F. L. Stewart to [99] reimburse him for the amount which he had paid the United States National Bank. That said new notes are the notes above mentioned and entered the Bank on the dates above mentioned.

XI.

That said bank suffered the loss of the sum of Five Thousand Eight Hundred Fifty-four and 78/100 (\$5854.78) Dollars on account of notes given by the Northwest Transportation Company to the said F. L. Stewart and by him discounted to the Kelso State Bank, said notes being issued by the Northwest Transportation Company, a corporation in which said F. L. Stewart was financially interested and was one of the incorporators and general manager, and the said Kelso State Bank by reason of the dishonesty of said F. L. Stewart in said matter suffered a loss of said sum of Five Thousand

Eight Hundred Fifty-four and 78/100 (\$5854.78) Dollars.

XII.

That the Northwest Transportation Company note for Twenty-five Hundred and No/100 (\$2500.00) Dollars, dated April 3, 1920, was a note executed by the Northwest Transportation Co. to F. L. Stewart for a loan which Mr. Stewart made said Transportation Company. That said note was discounted by Mr. Stewart with the Kelso State Bank and the proceeds were deposited in the account of Mr. Stewart in said Bank. The Northwest Transportation Company note of September 1, 1920, was a note for Five Thousand and No/100 (\$5000.00) Dollars executed by the Northwest Transportation Company to the Kelso State Bank, the proceeds of which, in excess of Twenty-one Hundred Four and 78/100 (\$2104.78) Dollars, were used in paying insurance, interest and revenue stamps. The sum of Twenty-one Hundred Four and 78/100 (\$2104.78) Dollars was deposited to the credit of F. L. Stewart. Prior to the time this note was executed, F. L. Stewart had paid debts of the Northwest Transportation Company amounting to more than the amount deposited to his credit out of the proceeds of said note. The two items of March [100] 10, 1921, for Four Hundred Fifty and No/100 (\$450.00) Dollars and Eight Hundred and No/100 (\$800.00) Dollars, respectively, were items deposited to the credit of F. L. Stewart out of the proceeds of a Twelve Hundred Fifty and No/100 (\$1250.00) Dollars note executed by the Northwest Transportation Company to the Kelso State Bank. On January

19, 1921, F. L. Stewart deposited the sum of Twelve Hundred Fifty and No/100 (\$1250.00) Dollars to the credit of the Northwest Transportation Company, and the note for Twelve Hundred Fifty and No/100 (\$1250.00) Dollars was given to reimburse him for the amount of such deposit. All of the Northwest Transportation Company notes, except the note of March 10, 1921, were renewed at various times, interest was collected on the same and the same were kept at all times in their regular place in the files of the Kelso State Bank.

XIII.

That during said year of 1920 while said bond was still in force and while said F. L. Stewart was cashier of said bank, the bank suffered a loss through a pretended loan made to Fritz Kruse, the proceeds of said note going to said F. L. Stewart and the bank thereby suffered a loss through the fraudulent and illegal acts of said F. L. Stewart of the sum of Forty-eight Hundred Eighty and No/100 (\$4880.00) Dollars.

XIV.

That, on January 19, 1921, while bond No. 886,520-A was in force said F. L. Stewart was the cashier of said bank the bank suffered a loss in the sum of Sixty-two Hundred Fifty and No/100 (\$6250.00) Dollars, of which amount Five Thousand and No/100 (\$5000.00) Dollars was taken by said F. L. Stewart from the bank and used in a private enterprise entered into between him and T. P. Fisk and the other Twelve Hundred Fifty and No/100 (\$1250.00) Dollars going to pay a private debt of said F. L. Stewart, the bank losing the whole sum

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of said Sixty-two Hundred Fifty and [101] No/100 (\$6250.00) Dollars through the dishonest and illegal acts of said F. L. Stewart. There being no recovery asked on account of this Twelve Hundred Fifty and No/100 (\$1250.00) Dollars, it is disallowed.

XV.

That the Kelso Farm Company was a trade name under which F. L. Stewart was operating a farm owned by him. That, on January 12, 1921, F. L. Stewart borrowed from the Kelso State Bank Twenty-two Hundred and No/100 (\$2200.00) Dollars on a note executed by said Kelso Farm Company, which note was carried as a cash item until February 18, 1921, when it passed into the records of the bank. That, on February 15, 1921, the Kelso Farm Company executed a note to the bank in the sum of Thirty-seven Hundred Fifty and No/100 (\$3750.00) Dollars, which amount was credited to the account of F. L. Stewart in said bank.

XVI.

That during the year 1918 and while bond No. 886,520 was in force and while F. L. Stewart was cashier of said bank, the bank suffered a loss of the sum of Four Thousand Fifty and No/100 (\$4050.00) Dollars through notes given by H. D. Phillips to said F. L. Stewart and by him discounted to the bank, said notes growing out of a private transaction entered into between Phillips and Stewart, the bank losing the said sum of Four Thousand Fifty and No/100 (\$4050.00) Dollars through the fraud and dishonesty of the said F. L. Stewart.

XVII.

That, in March, 1918, said H. D. Phillips purchased a farm from F. L. Stewart, and in partial payment thereof executed two (2) notes in the sum of Fifteen Hundred and No/100 (\$1500.00) Dollars each. These notes passed into the Kelso State Bank and the proceeds thereof were used in payment of a cash item which was initiated on March 11, 1918. And on March 20, 1918, said Phillips [102] executed a note for Five Hundred Fifty and No/100 (\$550.00) Dollars to the Kelso State Bank, of which amount Fifty and No/100 (\$50.00) Dollars was credited to the account of F. L. Stewart. On April 11, 1918, said Phillips executed a note to the Kelso State Bank in the sum of Fifteen Hundred and No/100 (\$1500.00) Dollars, of which amount Five Hundred and No/100 (\$500.00) Dollars was credited to the account of F. L. Stewart.

XVIII.

That during the year 1921, while bond No. 886-520-A was in force and said F. L. Stewart was cashier, the bank suffered a loss of Two Thousand and No/100 (\$2,000.00) Dollars by reason of certain warrants belonging to the Richter estate, being illegally transferred to the bank and the said F. L. Stewart withdrawing the sum of Two Thousand and No/100 (\$2000.00) Dollars on account thereof, the bank being forced to return the warrants thereby losing the sum of Two Thousand and No/100 (\$2000.00) Dollars through the dishonesty and fraud and illegal acts of the said F. L. Stewart.

XIX.

That the total amount of loss suffered by the said Kelso State Bank through the dishonest, fraudulent and illegal acts of the said F. L. Stewart while the bonds mentioned were in force and while said F. L. Stewart was cashier exceeds the sum of Twenty-five Thousand and No/100 (\$25,000.00) Dollars.

XX.

That, prior to the time said Kelso State Bank closed, the defendant, as surety, and the Kelso State Bank, as principal, executed two certain depository bonds in the penal sums of Forty Thousand and No/100 (\$40,000.00) Dollars, and Ten Thousand and No/100 (\$10,000.00) Dollars, respectively, to Linus Perry Brown, as county treasurer, of Cowlitz County, Washington, to secure deposits of county funds made by said county treasurer in said Kelso State Bank. That, at the time said bank closed, said Linus Perry [103] Brown as County Treasurer of said Cowlitz County had on deposit in said bank the sum of Sixty-four Thousand Four Hundred Sixty and 96/100 (\$64,460.96) Dollars, of which sum Forty-six Thousand One Hundred Sixty-three and 29/100 (\$46,163.29) Dollars was secured by said depository bonds executed by said defendant, as surety, and said Kelso State Bank, as principal; that the defendant was obliged to pay and did pay said county treasurer said sum of Forty-six Thousand One Hundred Sixty-three and 29/100 (\$46,163.29) Dollars, and that no part of this sum has been paid

said defendant by the Kelso State Bank, except dividends amounting to twenty (20%) per cent.

Dated this 6th day of April, A. D. 1923.

EDWARD E. CUSHMAN,
Judge. [104]

From the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW.

That the loss sustained by the Kelso State Bank as mentioned in the findings of fact was due to the dishonest, fraudulent and illegal acts of the said F. L. Stewart and within the provisions of the bonds, and that plaintiff is entitled to recover a judgment against the defendant in the sum of Twenty-five Thousand and No/100 (\$25,000.00) Dollars and interest thereon from the ninth day of September, A. D. 1921, and for his costs herein; that the defendant is not entitled to an offset of his claim on account of money paid to the county treasurer under the depository bond given to Cowlitz County against the judgment plaintiff is entitled to recover in this matter.

Dated this 6th day of April, A. D. 1923.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Apr. 6, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [105]

**Defendant's Exceptions to Findings of Facts and
Conclusions of Law and the Failure of the
Court to Adopt Findings and Conclusions Pro-
posed by Defendant.**

Comes now the above-named defendant, prior to the signing of the findings of fact and conclusions of law herein, and makes the following exceptions:

I.

Defendant excepts to Finding of Fact Number 4 upon the ground and for the reason that the same is not a full and complete finding of fact and is not in accordance with the evidence in this case.

II.

Defendant excepts to Finding of Fact Number 5 upon the ground and for the reason that there is no evidence to support said finding and that said finding is not a full and complete finding in accordance with the undisputed evidence in this case.

III.

Defendant excepts to Finding of Fact Number 9 upon the ground and for the reason that there is no evidence to support said finding.

IV.

Defendant excepts to Finding of Fact Number 11 upon the ground and for the reason that there is no evidence to support said finding.

V.

Defendant excepts to Finding of Fact Number 13 upon the ground and for the reason that there is no evidence to support said finding.

VI.

Defendant excepts to Finding of Fact Number 14 upon the [106] ground and for the reason that there is no evidence to support said finding.

VII.

Defendant excepts to Finding of Fact Number 16 upon the ground and for the reason that there is no evidence to support said finding.

VIII.

Defendant excepts to Finding of Fact Number 18 upon the ground and for the reason that there is no evidence to support said finding.

IX.

Defendant excepts to Finding of Fact Number 19 upon the ground and for the reason that there is no evidence to support said finding.

X.

Defendant excepts to the Court's conclusion of law herein and to the whole thereof.

XI.

Defendant excepts to the Court's refusal to adopt defendant's proposed Finding of Fact Number 4.

XII.

Defendant excepts to the Court's refusal to adopt defendant's proposed Finding of Fact Number 8.

XIII.

Defendant excepts to the Court's refusal to adopt defendant's proposed Finding of Fact Number 9.

XIV.

Defendant excepts to the Court's refusal to adopt defendant's proposed Finding of Fact Number 11.
[107]

XV.

Defendant excepts to the Court's refusal to adopt that portion of defendant's proposed Finding of Fact Number 14, reading as follows:

"That the Assistant Cashier and other officers of the Bank knew of said notes and that the Northwest Transportation Company was borrowing from said Kelso State Bank, and ratified said loans."

XVI.

Defendant excepts to the Court's refusal to adopt defendant's proposed Finding of Fact Number 15.

XVII.

Defendant excepts to the Court's refusal to adopt defendant's proposed Finding of Fact Number 16.

XVIII.

Defendant excepts to the Court's refusal to adopt defendant's proposed Finding of Fact Number 17.

XIX.

Defendant excepts to the Court's refusal to adopt that portion of defendant's proposed Finding of Fact Number 18, reading as follows:

"That the notes executed by said Phillips were secured by a mortgage on said farm purchased by Phillips from Stewart."

XX.

Defendant excepts to the Court's refusal to adopt that portion of defendant's proposed Finding of Fact Number 19, reading as follows:

"That on January 11, 1921, the Board of Directors of the Kelso State Bank authorized a loan to F. L. Stewart in the amount of

\$6000.00, and there was no loan made to him or note of his placed in said Bank after said date except said two notes of the Kelso Farm Company.” [108]

XXI.

Defendant excepts to the Court’s refusal to adopt defendant’s proposed Finding of Fact Number 20.

XXII.

Defendant excepts to the Court’s refusal to adopt defendant’s proposed Finding of Fact Number 21.

XXIII.

Defendant excepts to the Court’s refusal to adopt defendant’s proposed Finding of Fact Number 22.

XXIV.

Defendant excepts to the Court’s refusal to adopt defendant’s proposed Finding of Fact Number 23.

XXV.

Defendant excepts to the Court’s refusal to adopt defendant’s proposed Finding of Fact Number 25.

XXVI.

Defendant excepts to the Court’s refusal to adopt defendant’s proposed Conclusion of Law Number 1.

XXVII.

Defendant excepts to the Court’s refusal to adopt defendant’s proposed Conclusion of Law Number 2.

Dated this 5th day of April, A. D. 1923.

GRINSTEAD, LAUBE & LAUGHLIN,

And THOMAS E. DAVIS,

Attorneys for Defendant. [109]

The foregoing exceptions were presented to the Court prior to the signing of the findings of fact and conclusions of law herein. At the time of settling

the findings of fact, the defendant duly excepted to the adoption of the findings of fact in favor of the plaintiff and excepted to the Court's refusal to adopt the findings of fact proposed by the defendant and, at said time, duly excepted to the court's adopting the conclusion of law in favor of the plaintiff, and excepted to the Court's refusal to adopt the conclusions of law in favor of the defendant; all as set forth in the foregoing exceptions, all of which said exceptions are hereby allowed to the defendant.

Done in open court this 6th day of April, A. D. 1923.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Apr. 6, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [110]

Judgment.

This cause having been brought on for trial on the 24th day of October, 1922, before the Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, a trial by jury having been waived by stipulation duly signed by respective counsel, which stipulation is filed among the records of this action, and the plaintiff appearing by his attorneys, Messrs. Miller, Wilkinson & Miller, and the defendant appearing by its

attorneys, Messrs. Grinstead & Laube and Thomas E. Davis, and witnesses having been sworn and testimony, both oral and documentary, having been given, said cause having been submitted to the Court and by the Court taken under advisement and the Court having heretofore made and filed its findings of fact and conclusions of law, and being fully advised in the premises,—

IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff do have and recover of and from the defendant judgment in the sum of Twenty-five Thousand and No/100 (\$25,000.00) Dollars, together with interest thereon at the rate of six (6%) per cent per annum from the 9th day of September, A. D. 1921, and costs and disbursements herein taxed at 233.00 Dollars and that execution issue therefor.

To the foregoing judgment and to the whole thereof, the defendant at the time duly excepted, and its exception is hereby allowed and noted of record.

Done in open court this 6th day of April, A. D. 1923.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Apr. 6, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [111]

**Stipulation Extending Time to and Including May
15, 1923, to File Bill of Exceptions.**

IT IS HEREBY STIPULATED AND AGREED by and between the above-named plaintiff, by his attorneys, Messrs. Miller, Wilkinson & Miller, and the above-named defendant, by its attorneys, Messrs. Grinstead, Laube and Laughlin and Thomas E. Davis, that the defendant may have until May 15th, 1923, in which to prepare and serve on plaintiff's attorneys its bill of exceptions herein.

Dated this 8th day of March, 1923.

MILLER, WILKINSON & MILLER,
Attorneys for Plaintiff.

GRINSTEAD, LAUBE & LAUGHLIN,
And THOMAS E. DAVIS,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 22, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [112]

**Order Extending Time to and Including May 15,
1923, to File Bill of Exceptions.**

This matter coming on to be heard on motion of the defendant, by its attorneys, Messrs. Grinstead, Laube & Laughlin, and Thomas E. Davis, for an order extending the time for preparing, serving and filing a bill of exceptions herein, and it appearing to the Court that said motion is timely made and

that written notice of the decision herein was not received by said defendant or its attorneys until the 2d day of March, 1923; and it further appearing to the Court that good cause exists for extending the time,—

IT IS HEREBY ORDERED that the defendant do have until the 15th day of May, 1923, in which to prepare and serve its bill of exceptions upon plaintiff's attorneys.

Done in open court this 8th day of March, 1923.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [113]

Request for Order Allowing and Settling Bill of Exceptions.

Comes now the above-named defendant, Fidelity & Deposit Company of Maryland, a corporation, and proposes the following stenographic report of the trial consisting of pages 1 to 257, inclusive, with the index preceding the same and the certificate following the same, to be hereafter signed by the Judge, together with all the exhibits, records and documents referred to therein, as its bill of exceptions in the above-entitled cause, and asks to have the same duly allowed, settled and signed as and for the bill of exceptions in said cause, and as containing all of the evidence material to the hearing of

said cause upon writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

GRINSTEAD, LAUBE & LAUGHLIN,

And THOMAS E. DAVIS,

Attorneys for Defendant. [114]

Bill of Exceptions.

BE IT REMEMBERED that: Heretofore and on the 25th day of October, 1922, the above-entitled cause coming regularly on for trial before the Honorable E. E. CUSHMAN, one of the Judges of the above-entitled court, and the jury being waived by the respective parties; and .

The plaintiff being represented by the firm of Miller, Wilkinson & Miller (by Mr. A. L. Miller), and

The defendant being represented by the firm of Grinstead & Laube (by Mr. Grinstead), and by Thomas E. Davis, Esq., and

The parties hereto having announced in open court that they were ready for trial.

The following proceedings were had and done herein, to wit: [115]

Testimony of T. H. Adams, for Plaintiff.

T. H. ADAMS, a witness called by the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Your name is T. H. Adams? A. Yes, sir.

(Testimony of T. H. Adams.)

Q. You are special deputy supervisor of banking of the state, liquidating the Kelso State Bank?

A. Yes, sir.

Q. How long have you been in charge of the assets of the bank?

A. Since the 27th of April, 1921.

Q. This bank was taken possession of by the bank commissioner on what date?

A. On the 17th of March, 1921.

Q. 1921? A. Yes, sir.

Q. And you took possession within a short time thereafter? A. Yes.

Q. And you have been in possession since?

A. I have.

Q. Settling up the affairs of the bank?

A. Yes, sir.

Q. And you are yourself doing that work?

A. Yes.

Q. Have you had occasion to go through the books of the bank to familiarize yourself with the financial condition?

A. Yes, I have gone through parts of the books a great many [116] times. Of course, on the other hand, you will appreciate how limited that would be to within a year, examine the books of 25 years' existence, but the books in use for the last few years, I am quite familiar with.

Q. There has been a lot of litigation growing out of this wreck, has there not?

A. Yes, we have had 35 or 36 suits so far.

(Testimony of T. H. Adams.)

Q. Perhaps I ought to ask you whether the bank is insolvent?

A. Yes, the bank is insolvent; had been for many years.

Q. And you are closing up its affairs? A. I am.

Mr. GRINSTEAD.—Had been insolvent for many years? A. Yes.

Q. Now, did you find among the,—I think this is admitted,—papers of the bank, those bonds on which this litigation is founded? A. I did.

Q. Then you also found among the papers, renewals of the bonds? A. I did.

Mr. MILLER.—It has been suggested, that these renewals be attached, to save time. We would like to offer in evidence, bond number 886,520, and renewals from 1914 to 1920, as one exhibit.

The COURT.—Admitted.

Thereupon said bond number 886,520, with renewals attached, was received in evidence, and marked Plaintiff's Exhibit 1, there being no objection by the defendant.

Q. You also found this bond of 1920? [117]

A. Yes.

Mr. MILLER.—Any objection to this?

Mr. GRINSTEAD.—No, there is no objection.

Mr. MILLER.—We will offer this bond in evidence, may it please the Court.

The COURT.—Admitted.

Thereupon said bond number 886,520—A, was received in evidence and marked as Plaintiff's Exhibit 2.

(Testimony of T. H. Adams.)

Q. I wish you would explain to the Court the general methods pursued by this bank in keeping its books and records.

Mr. GRINSTEAD.—Of course I do not know what Mr. Adams intends to state, I do not know whether it is going to be material. I have no objection to it, except I do not care to have it go on without objection. Of course, if it is a general statement, that is all right.

Mr. ADAMS.—That was our idea that I ought to make a general statement. Mr. Davis is very familiar with them, I think, but perhaps the rest of you, including the Court, would be enlightened somewhat, by a general idea of what system was employed.

Mr. MILLER.—Go ahead.

A. As in all banks, individual deposits, or all deposits in the bank were initiated or started with a deposit ticket, and were withdrawn with a check unless the bank had occasion to make a debit charge, which it sometimes did. I think all banks are alike in that respect. This package represents the month of December, 1916, and represents the deposits made during that month. Each month the tickets are bound in this form. [118]

Q. Of all of the depositors?

A. Yes, of every kind in that bank. Some banks would keep their bank deposits and their other deposits separately, but this bank did not. All of the deposits of the month are in that list. All of what are termed general credits, credits of all character

(Testimony of T. H. Adams.)

other than credits to depositors, are put up originally in a form like this; each day is clipped together with a metal clip. The tickets for the month are all bound in this form, which represents credits of every character except credits to depositors, and there is a debit ticket corresponding to this, to which I do not think we will need to refer, perhaps.

Q. Go ahead. Have you another book there?

A. This book is a discount register.

Q. What does that show?

A. It shows serially the notes and discounts as they came into the bank, and everything contained in this book, is contained in other books, but this is a sort of reference or index. Well, it is merely a register of the notes. They are accounted for in other places, but this is a book used for convenience of the bank in referring to them readily, and not for a record of them.

Now, those are the books we shall refer to generally, and perhaps all that are in any way different from the average country bank.

Q. Now, Mr. Adams, in going over the records of the bank, have you found any notes or credits of any character, which have been handled by or given to Mr. Stewart, in which the bank has suffered a loss? [119] A. Yes.

Q. Now, have you made a list of those?

A. Well, I have a partial list here, a list which we prepared and presented to the Bonding Company, a short time after I took charge. That does not cover nearly all of the losses that the bank has

(Testimony of T. H. Adams.)

suffered through a similar manipulation, but it does cover what we are basing our claim on. Not quite all, there is one other item not mentioned in here, but it is in the amended complaint, I think.

(Discussion.)

(By Mr. MILLER.)

Q. Explain that book to the Court.

A. This book is the book that Mr. Stewart kept individually.

Q. That is the cage-book?

A. That is his cage-book and represents on Oct. 4, 1915, all the business that he did that day. At evening it is checked into the chief teller who happens to be in this bank, Mr. Plamondon,—the assistant cashier who is responsible for all the cash and for the balances of the bank. This column (indicating) represents notes taken into the bank, or discounted for that day. [120]

This column represents notes paid during the day, and this column the interest paid. This column, if there is anything in it, if the note had been discounted, it would represent the interest or note discounted.

Q. You mean by that the discount in this last column refers to a sale to some other bank?

A. No, in the event that it is discounted,—discount is usually in reference to a note that draws no interest but the interest is taken out in advance. The interest would be in there (indicating) if that had been an interest drawing note.

Q. We do not have any of that in this matter?

(Testimony of T. H. Adams.)

A. No, I do not think it comes in at all.

Q. No, I do not think so.

A. Maybe once. Over here is the individual deposits that he took. I might explain to the attorneys and the Court, Mr. Stewart sat back in a private office and when he took an occasional deposit such as would come in this way he would make an entry of it in this book. He was not at the window.

Mr. DAVIS.—Are you testifying from your own knowledge or what somebody has told you?

A. From both. I was in Mr. Stewart's bank frequently—not frequently, but occasionally, and know how he did it and know how the bank books show it.

Q. You mean the books of the bank?

A. The bank books, yes.

Mr. GRINSTEAD.—Of course, if this is a preliminary statement, I do not want to interfere with him, but as far [121] as it is a conclusion I want the Court to bear in mind, while we are willing to let the books show,—

The COURT.—You have examined these books?

A. Yes, I simply wanted to give this so that the Court and all of you would understand the process. It is immaterial except that, to show that all the business he did is written up in this book.

The next one is \$1,500, March 20th, H. E. Phillips?

A. March 20, 1918, H. D. Phillips, and the number of the note 7667, \$1,500.

(Testimony of T. H. Adams.)

Reading from Stewart's cage-book, March 20, 1918, note discounted, H. D. Phillips, \$1,500. These two \$1,500 items go together.

Q. Let us put the other \$1,500 in, both together?

A. Well, we will take the next number, same date, March 20, 1918, H. D. Phillips, No. 7668, \$1,500. I am reading from vol. "D," page 92, Note register.

Mr. GRINSTEAD.—This is pleaded as \$15. The second one is [122] pleaded as \$15.00.

Mr. MILLER.—No, but right on down in the next line is another \$1,500 note.

WITNESS.—That \$15 should have been \$1,500. It is a typographical error, that is all there is to it.

Mr. MILLER.—It appears in the complaint that note was for \$15 when it should have been for \$1,500, it is a typographical error, and I will ask to amend the original complaint to show that.

Q. Now, the discount register, that shows the two \$1,500 on the same date? A. Yes.

Q. Both given by Phillips to the Kelso bank, and on this page 92?

A. Yes. From Stewart's cage-book March 20th, 1918, among the notes discounted, H. D. Phillips, an additional \$1,500 or \$1,500 after the one read a moment ago.

Q. Two \$1,500 notes? A. Yes.

Q. You go right on through the records pertaining to these \$1,500 notes.

A. On the same page and the same date, March

(Testimony of T. H. Adams.)

20, 1918, Stewart's cage-book among the individual checks carried, from F. L. Stewart, \$200. Going back to March 11, 1918, Stewart's cage-book for March 11, 1918, there is initiated an item of \$3,200 a cash item of \$3,200. Under "sundry credits" the savings account is credited \$3,000. In individual deposits, F. L. Stewart, \$200. This makes up the cash item of \$3,200.

Q. In whose favor? [123]

A. Cash item only. It is not cash, but it is carried as cash and it follows through day by day in Stewart's cage-book and it is carried all along up to March 20th, when it is dropped, when it disappears.

Going back to the date mentioned, March 11, the savings account of F. L. Stewart, guardian to Henry Dearing, incompetent,—I am reading from book 603 sheet No. 2, savings account of the Kelso State Bank.

Q. This account is credited on that date \$3,000?

A. Yes.

Q. What date is that?

A. On the 11th of March, 1918, the date that this savings item appears in Stewart's cage-book. This is a savings account.

Q. This is a savings account which he carried with his ward as guardian. On that date that is the credit?

A. On that date, the same date, March 11, 1918, reading from the deposit ticket, F. L. Stewart, March 11, 1918, in Stewart's own handwriting, Can-

(Testimony of T. H. Adams.)

nery mortgage, \$3,200; loaned Dearing \$3,000; net \$200, F. L. Stewart, cashier.

Q. Now for the purpose of getting in the record, would there be any other entries pertaining to these two \$1,500 notes appearing between the 11th and the date they are entered in the note register, other than the record day by day of the cash item of \$3,200 that was carried forward, from what date?

A. From the 11th of March; it shows here the 12th of March. Every day's business shows it until the note came in.

Q. Until the \$1,000 note came in?

A. Yes. Then it disappears. [124]

Q. Is that all the record that pertains to this \$1,500 note? A. No.

Q. If there is any more, let's have it.

A. It does not directly pertain to the note, but it pertains to this item of Deering's.

Q. Let's have it.

Mr. GRINSTEAD.—I think we better pass that. If we have a little time to look that over, I might waive it all.

Q. Commencing with March 20th, \$500, H. D. Phillips, what have you?

A. Vol. "D," Page 92, March 20, 1918, H. D. Phillips, No. 7669 \$550.

Then Stewart's cage-book of March 20, 1918 among notes discounted, H. D. Phillips, \$550. On the reverse side in individual deposits, F. L. Stewart, \$50.

Q. \$500?

(Testimony of T. H. Adams.)

A. Well, it will appear in the explanation.

Q. May be wrong, I do not know.

A. Yes, this is correct, F. L. Stewart; credit \$50. N. E. Q. \$459.60, there is a charge of revenue stamps, 2 charges of revenue stamps one for \$12.80 and one for \$1.00.

This is only a deduction; in that is the difference between \$459.60 or .40.

In the deposit ticket under the work of March 20, 1918, F. L. Stewart, March 20, 1918, Phillips, \$550, less N. E. Q. credit, \$500. Net \$50. F. L. Stewart, Cashier.

Under the same date, N. E. Q. March 20, 1918, Stewart \$500 less interest on \$2,000 note, three months at eight per cent sum of \$40 revenue \$.40. A total of \$40.40; \$459.60 net. [125]

Connecting up again Stewart's cage-book shows he renewed a note that day of \$2,000. I will read the record; Notes Discounted, N. E. Q. \$2,000; Notes paid, N. E. Q. \$2,000, interest \$40.

Q. I do not know it sufficiently appears from the record,—(reading).

A. I was reading from the deposit ticket March 20, 1918.

Q. That is all there is pertaining to this \$500?

A. Yes.

Q. All right, April 11.

A. Vol. D. Page 94 Discount register, H. D. Phillips. No 7761, \$1,500.

Reading from Stewart's cage-book, April 11, 1918, among notes re-discounted, H. D. Phillips, \$1,500.

(Testimony of T. H. Adams.)

On the reverse page under individual deposits, F. L. Stewart, \$500.

Reading from Mr. Stewart's cage-book, among notes paid on that date, H. D. Phillips, \$1,000.

Deposit ticket of March 11, 1918, F. L. Stewart, a credit, note of H. D. Phillips, \$1,500; less note of the same party same date renewed, \$1,000, net \$500. F. L. Stewart, cashier.

Mr. MILLER.—I notice in the record of that note of March 20, 1918, for \$1,500, less \$100, signed by Phillips, should be \$500 and I ask to amend my pleadings accordingly. [126]

Q. The next one is September 10th, 1920, Fritz Kruse?

A. In the note register, Book E, page 29, under date of September 10th, note No. 1202, amount \$5,000. In the cage-book of Stewart, Fred Kruse, of date Sept. 10, 1920, notes discounted, \$5,000. Other side there is a credit, F. L. Stewart, under title of Individual deposits, in Stewart's handwriting, \$1,880.

Going back to August 24, 1920, in the deposit ticket for that day, credit F. L. Stewart note \$1,500, F. L. Stewart cashier. Stewart's cage-book for that day shows deposit under individual deposit of \$1,500, to F. L. Stewart, and [127] on the reverse page, cash item of \$1,500. That cash item of \$1,500 is carried through from day to day in Stewart's cage-book, to August 31. In Stewart's cage-book of August 31, under individual deposit, F. L. Stewart, \$1,000, and on the reverse page, cash item of

(Testimony of T. H. Adams.)

\$1,500 is raised to \$2,500; and in the deposit of August 30, 1920, in Stewart's handwriting, F. L. Stewart, \$1,000, F. L. Stewart, cashier.

On the following day, September 1st, reading from Stewart's cage-book of September 1st, 1920, under individual deposits, F. L. Stewart, \$500, and on the opposite page cash items are raised to \$3,000; under date September 1st, deposit slips show F. L. Stewart, September 1st, 1920, \$500. That \$500 is written out and in figures also. F. L. Stewart cashier. On that date, in the cage-book, if I did not testify to it before, the cash item is raised to \$3,000. That item of \$3,000 is carried forward, and second, third, fourth, fifth, sixth, seventh and ninth and on the tenth it disappears. You have there an item of \$1,180, Stewart's individual deposit on that date, making \$4,880.

Q. Is that all the books show in reference to that particular transaction?

A. Well the books will show September 10, 1920, —yes, that is all. That note is renewed again.

Q. I do not care about the renewals.

A. I thought you meant if that concluded the Kruse entries. So far as this transaction is concerned, the books show nothing else I know of.

Q. Your next one is March 11th, 1920?

A. March 11, 1920, Fred Shepard, Note No. 481, \$589.40; [128] discounted, discount-book "E," page 12.

Q. This note appears on the discount-book, page 12, book "E." A. Yes.

(Testimony of T. H. Adams.)

Mr. MILLER.—And for the present, we cannot find the cage-book.

WITNESS.—It will be in Miss Waugh's cage-book, I am sure, because this deposit is made in her handwriting.

In the work of the 9th, but dated the 10th, deposit slip of F. L. Stewart, 3/10/20, Frank Shepard note, \$589.40; Al Burcham note \$182.45, leaving \$771.81, net to Stewart. That is in Miss Waugh's handwriting and would probably be in her cage-book, but the Burcham note should appear in the ticket unless it is something irregular some way, is carried some other way for a day or two.

Q. We will pass that for the present.

A. I will dig that out to-night.

Q. The next one is April 3, Northwest Transportation Company, April 3, 1920?

A. Note register April 3, Northwest Transportation Company, endorsed by F. L. Stewart.

Q. Give date and page.

A. Page 14, of Discount Register "E," April 1920, made payable to Kelso State Bank, endorsed by F. L. Stewart, note No. 581, \$2,500.

It happens to be in Plamondon's cage-book, April 3, 1920, note discounted \$2,500, without giving the number. Under individual deposit, \$5,000 without giving the recipient.

Q. That is on the other side?

A. Yes, on the reverse side, under the individual deposits. [129] Under date April 3, 1920, in the deposit ticket, in Plamondon's handwriting, under

(Testimony of T. H. Adams.)

the credit of F. L. Stewart, Separate note, \$2,500; Northwest Transportation Note, \$2,500, total \$5,000.

Q. The whole note went to the credit of Stewart?

A. The whole note went to the credit of Stewart.

Q. Now, one note of \$1,000, April 23, Frank Sheppard.

A. Book "E," April 23, Frank Sheppard, Note No. 668, \$1,000.

In Mr. Plamondon's cage-book, April 23, 1920, under the title of Notes Discounted, item of \$1,000 appears without comment, and on the opposite page under individual deposits, the sum of \$1,000 appears without comment.

In the individual deposit ticket of the 23d of April, 1920, credit to F. L. Stewart, separate, \$1,000.

Q. Whose handwriting?

A. In Plamondon's handwriting.

Q. Now, the next is a note of Frank Sheppard of July 19?

A. Book "E," of discounts, page 24, dated July 19, payable to Kelso State Bank, No. 986, given by Frank Sheppard, \$1,000. In July, from July 19, 1920 in Stewart's cage book, under notes discounted, Frank Sheppard, \$1,000. In this same book, under this same date, cash items reduced, or the item of \$1,000 disappears from the cash items.

Q. You have testified there was \$1,000 that disappeared from the cash items?

A. Yes, there were carried two items during that time, \$1,000 each.

Q. Had been carried for several days before?

(Testimony of T. H. Adams.)

A. Yes. Stewart's cage-book of July 16th, 1920, [130] raised \$1,000, that is, an item of \$1,000 is added; and in the individual deposits, Frank L. Stewart is credited \$1,000.

In the deposit ticket of July 16th this ticket appears. F. L. Stewart, July 14th, 1920, note, F. F. Sheppard, \$1,000, F. L. Stewart, cashier.

Mr. GRINSTEAD.—I move to strike all of the witness' testimony from and after the record in the cage record of July 19th as not tending to prove any of the issues raised by the pleadings herein, and as incompetent, irrelevant and immaterial, not covered by the claim propounded in accordance with the terms of the bond.

The COURT.—Motion denied. Defendant excepts. Exception allowed.

Q. Aug. 13th, 1920 is the next transaction, Frank Sheppard, \$1,000?

A. The note register book "E," page 26, Aug. 13, 1920, Frank Sheppard, No. 1082. I might add here that there are three notes each for \$1,000 signed by Sheppard, Nos. 1082, 1083, 1084. I do not know which one of these notes is in controversy. They are all made by Frank Sheppard to the Kelso State Bank.

Stewart's cage-book, Aug. 13, 1920, under notes discounted, Frank Sheppard, \$1,000, \$1,000, \$1,000, three \$1,000 notes. On the opposite page appears, under individual deposits, \$1,000. Are you interested in the counting for the others?

Q. No, not unless they are involved here?

(Testimony of T. H. Adams.)

A. The deposit ticket of August 13th, 1920 shows F. L. Stewart, August 13, 1920, F. Sheppard, \$1,000. F. L. Stewart, cashier.

Q. There are two notes of Frank Sheppard on that date? [131]

A. We have three there of \$1,000 each.

Q. Now, where is your other deposit slip covering the other \$1,000?

A. I have already covered that, there were three notes given on that date. Are we claiming another thousand?

Q. Yes, claiming \$2,000, notes of August 13.

A. That is another one of those cash items appearing on that date.

Q. That is what we want?

A. On August 13th, 1920, there disappeared from Stewart's cash items, one item of an even thousand dollars. Back to the cage-book, April 27, 1920, under individual deposits we find F. L. Stewart credited \$1,000 and \$1,000 on the reverse or on the opposite side and added to the cash items.

Among the individual deposit tickets, July 27, F. L. Stewart, July 27, 1920, separate note, \$1,000. F. L. Stewart, cashier.

Mr. GRINSTEAD.—I now move to strike all the testimony of the witness pertaining to cash items disappearing and all the testimony subsequently taking back on that as not tending to prove any issue pleaded in this case and as incompetent, irrelevant and immaterial and not within the case

(Testimony of T. H. Adams.)

propounded herein against the bond sued on in this action.

The COURT.—Motion denied. Defendant excepts. Exception allowed.

Q. The next is September 1st, 1920, Northwest Transportation Company, \$5,000 note; claim of \$2,104.78.

A. On April 28, on the note-book "E," No. 1158, Northwest Transportation Company note given to the Kelso State Bank for \$5,000. [132]

Plamondon's cage-book, September 1, 1920, shows only the aggregate of notes discounted that day. \$12,025. On the opposite page, among the individual deposits is an item of \$2,104.78.

Among the individual deposit tickets of September 1st, 1920, we find deposited to the credit of F. L. Stewart, Northwest Transportation Company, \$5,000, Ditto, Northwest Transportation Company, \$1,000.

Q. You mean two notes there each for \$5,000?

A. Yes. Interest from 6/29 to date, two months four days, \$122.22; making a total of \$1,014.22; less note of \$5,000 interest, \$33.33 making a total of \$5,108.89 after the subtraction; less insurance, \$200, and an item not indicated of \$2,702.94 and an item of \$99.17, not indicated, making a total of \$3,002.11, which subtracted from the total above gives \$2,106.-78, less revenue stamps of \$2, net of \$2,104.78. This appears in Mr. Plamondon's handwriting.

Q. September 29, the next item, Frank Sheppard, \$1,000?

(Testimony of T. H. Adams.)

A. This item appears on page 31 of the note register book "D" and is No. 1264, to the Kelso State Bank for \$1,000.

Plamondon's cage-book September 29, 1920, shows a total of notes discounted, \$2,900, without comment. Under individual deposits there is an item of \$1,000, carried without comment.

In the deposit ticket of that date F. L. Stewart, 9/29/20, separate, \$1,000.

Q. Whose handwriting?

A. Plamondon's handwriting. I do not think it is material, but this is a little out of the usual for Plamondon's handwriting. [133] It might possibly be somebody else's, but it is not Stewart's. It is not Stewart's.

Q. The next is 1921, Kelso farm, January 12, 1921, \$2,000 note.

A. In the discount register "E" on page 46 under date of April 18th, Kelso Farm Company to the Kelso State Bank, No. 1912, \$2,200.

Stewart's cage-book of the date of February 18, 1921, under notes discounted, Kelso Farm Company, \$2,200. On that date, a cash item of \$2,200 disappears, which cash item appears in Stewart's cash-book under date of January 12, 1920.

Q. Well, do you mean that as 1920 or 1921?

A. It is all 1921, but the book is dated 1920 part of the time [134] and in 1921 part of the time.

Q. It is redated?

A. Yes, it is redated 1921. On that date on the

(Testimony of T. H. Adams.)

opposite page, F. L. Stewart received credit for \$3,100 under individual deposits.

In the deposit ticket of January 12, 1921, to the credit of F. L. Stewart:

F. A. George	\$900
Kelso Farm Co.	\$2,200
Making a total of	\$3,100

That is signed F. L. Stewart, cashier, and that is in Stewart's handwriting.

Q. That completes that, does it?

A. Yes, except I want to state further that this \$2,200 is carried as a cash item continuously from the date it is initiated to the date referred to.

Mr. GRINSTED.—I now move to strike all the testimony in connection with the cash items disappearing in connection with this cash item, and all of the testimony pertaining to this item subsequent thereto, as incompetent, irrelevant and immaterial and not tending to prove any of the material issues in this case, and not being within the notice and claim filed, pursuant to the terms of the bond sued on.

The COURT.—Objection overruled; exception allowed.

Q. The next is a note signed by the Kelso Farm Company, for \$3,750, dated February 15th, 1921.

A. That appears in book "E" of notes, page 46 and is number 1900, payable to the Kelso State Bank and is for \$3,750.

Reading from Stewart's cage-book, February 15th, 1921, under title of notes discounted, Kelso

(Testimony of T. H. Adams.)

Farm [135] Company, \$3,750. On the opposite page, in individual deposits, F. L. Stewart, \$3,750.

Reading from the deposit ticket of February 15th, 1921, Kelso Farm Company, \$3,750. F. L. Stewart, cashier.

Q. All right, the next is one note for \$6,250,—this is the Fisk note.

Mr. GRINSTEAD.—The title of that note here is “The Fisk dummy note.” We all refer to it as the Fisk dummy note.

Q. Does this note appear in the note register?

A. It does.

Q. What page, what is the date?

A. January 19, 1921. This note is given on page 43 of note register “E.”

Q. Whose name?

A. P. T. Fisk, No. 1778, and is for \$6,250.

Mr. MILLER.—Will it be necessary for me to bring Mr. Fisk here to deny that he ever signed that note or authorized it to be signed?

Mr. GRINSTEAD.—I think, if it is not signed, the note itself will show that it is not signed.

Mr. ADAMS.—We will put Mr. Davis on the stand to prove that.

Q. Go ahead.

A. On January 19, 1920, reading from Stewart’s cage-book of notes discounted, P. T. Fisk, \$6,250. On the opposite page, under individual deposits, F. L. Stewart, \$5,000. Northwest Transportation Company, \$1,250.

(Testimony of T. H. Adams.)

Reading from the deposit ticket of January 19, 1921, F. L. Stewart, to the Credit of F. L. Stewart, January 19, 1921:

P. T. Fisk \$6,250

[136]

Less Transportation Company.... \$1,250

Net \$5,000

Mr. MILLER.—That is all we will offer now about the Fisk note. Later on we may want to make an explanation of that.

Q. Now, the next is March 10, 1921, Northwest Transportation Company, \$2,000, claiming \$450 against the bond.

A. That appears on page 48 of the Note Register "E" Northwest Transportation Company, No. 1998 for \$2,000 payable to the Kelso State Bank.

March 10, 1921, reading from Stewart's cage-book, under notes discounted, Northwest Transportation Company, \$2,000.

Q. What is on the other side?

A. There is nothing else except on that date the cash item which had been carried in the work this appears.

Q. For how much? A. \$2,000.

Mr. MILLER.—He has it in the notice served upon you, March 10th, \$2,000 of the Northwest Transportation Company, on which you are charged with a \$450 liability. It now appears on the first day of March, Northwest Transportation note of \$2,000 and the deposit slip of that date shows that Stewart was given credit for \$450 on that note, but so far

(Testimony of T. H. Adams.)

as we have been able to find, he has taken no credit out of the \$2,000 note of March 10th.

Q. Mr. Adams, do you find in the record a note of March 10th of the Northwest Transportation Company for \$2,000?

A. I do. In Stewart's cage-book, under March 10, *appears* under notes discounted a note of *the* Transportation Company in the sum of \$2,00 [137] a cash item in the sum of \$2,000 disappears.

Q. And that cash item had been carried for some time? A. Oh, for a long time.

Q. Now, is there any further evidence that this \$450 was appropriated or received by Fred Stewart on the books? A. No, not so far as I find.

Q. And what does your record show as to the date of March 1st?

Mr. GRINSTED.—I object to that as incompetent, irrelevant and immaterial and not within the issues of this case and not tending to prove any material issue in this case and not within the claims propounded under the bond sued on herein.

Q. What does your record show as of March 1st?

A. Discount register on page 47, Register Vol. "E" on March 1st, Northwest Transportation Company to Kelso State Bank, No. 1959, \$2,000.

Q. What does the cage record show?

A. Stewart's cage-book of March 1st, 1920, under notes discounted, Northwest Transportation Company, \$2,000. On the reverse or opposite side, F. L.

(Testimony of T. H. Adams.)

Stewart, under individual deposits received credit for \$450.

Among the deposit slips of March 1st, 1921 there is one to the credit of F. L. Stewart, March 1st, 1921, Northwest Transportation Company, \$450.

Q. That completes it, does it? A. Yes.

Mr. GRINSTEAD.—We move to strike all that *testimony material*.

the next is \$1,250, note of the *North rtation Com-*
pany, March 10th. [138]

A. That appears on book "E" of the note register on page 48 and is number 1993, for \$1250.

Stewart's cage-book March 10, 1921, and under the heading of Notes Discounted, Northwest Transportation Company, \$1250. On that date, cash item of \$1,250 disappears from the records.

Q. Now, Mr. Adams, read into the record what we know the bank records show in reference to these two notes, \$1250 note and \$2000 note heretofore referred to, given by the Northwest Transportation Company on March 10, 1921.

Mr. GRINSTEAD.—I object to that upon the ground that it is incompetent, irrelevant and immaterial, not within the claim filed in accordance with the bond, or the issues propounded in the pleadings herein.

The COURT.—Objection overruled. Exception allowed.

A. On the 10th of March these two notes, of one \$1,250, and one of \$2,000 of the Northwest Transportation Company are taken by the Kelso State

(Testimony of T. H. Adams.)

Bank and appear on their notes discounted. On that date the cash item in the sum of \$1,250 and another cash item in the sum of \$2,000 disappear from the record. The cash item of \$1,250 originated in the record on the 1st of March, 1921, on which date under "individual deposits" F. L. Stewart received credit for \$450 and the Kelso Farm Company, \$800. On this date of March 1st, 1921, Kelso State Bank received, reading from Stewart's cage-book, note of the Northwest Transportation Company in the sum of \$2,000, and on that date a cash item in the sum of \$2,000 disappeared. I suppose neither one desires to trace these items that are not mentioned. [139]

Mr. MILLER.—No. Not those additional items.

Mr. GRINSTEAD.—I move to strike the testimony as not material and not conforming with the issues, not tending to bind the surety, and not in accordance with the claim filed.

(Overruled. Defendant excepted. Exception allowed.)

Q. Do your deposit slips show anything with reference to these two notes?

A. Among the deposit tickets of March 1, 1921, is one to the credit of F. L. Stewart, March 1st, 1921, Northwest Transportation Company, \$450. There is another one with the Farm Loan.

Q. Another with the Farm Loan?

A. Under the same date, March 1st, 1921, there is a ticket to the credit of the Kelso Farm Com-

(Testimony of T. H. Adams.)

pany, February 28, 1921, Stewart, \$800. F. L. Stewart, cashier.

Q. February 28?

A. That is the date of the ticket of the Kelso Farm Company, but it appears in the work of the 1st of March.

Q. When does that appear in the cage register, that \$800?

A. It appears March 1st, as a credit to the Kelso Farm Company.

Q. When does that disappear, what becomes of it?

A. Well, it is balanced on that date by some item on the other or opposite page, and would need to be balanced either by the cash item of \$1,250 or by the note of the Northwest Transportation Company in the sum of \$2,000, since there is no other item that is sufficiently large.

By Mr. GRINSTEAD.—We move to strike out the statement of the witness as to what needs to be done, as immaterial.

WITNESS.—I will give it to you in a plain way. On that day there is a credit of \$800 here to the Kelso farms. On the other page there is nothing big enough to absorb that [140] except the \$2,000 and the \$1,250.

Mr. GRINSTEAD.—I understand Mr. Adams, that you do not know whether this individual credit deposit of \$800 to the Kelso Farm that appears on March 1st, 1921, is taken out of the Northwest Transportation Company's note of \$2,000 that

(Testimony of T. H. Adams.)

appears under notes discounted, or out of the cash item of \$1,250 that appears on the other side.

A. By the process of elimination I do know that it comes out of the \$1,250.

Q. It comes out of the \$1,250 cash item?

A. Yes.

Q. And not out of the Northwest Transportation Company? A. Yes, shall I show that for you?

Mr. GRINSTEAD.—No, that is all right.

Mr. MILLER.—That is all right.

WITNESS.—In reference to this matter of \$800 which the tickets reads deposited by Stewart,—under individual checks of both of these days, I discover there is no such item, so it could not have been deposited by Stewart with a check. [141]

October 27th, 1922, ten o'clock A. M.

Trial continued as follows:

Mr. ADAMS, being recalled, continued his testimony as follows:

Direct Examination (Continued).

(By Mr. MILLER.)

Q. We took an adjournment yesterday afternoon when we had reached a part of the complaint which refers to certain items of claimed liability, as set forth in paragraph IX of the complaint. These items charged in the complaint were discovered after you took charge of the bank?

A. They were.

Q. And are not included in the claim that was made to the company? A. They are not.

(Testimony of T. H. Adams.)

Q. Were they discovered after the claim was made? A. They were.

Q. The first one that is mentioned in Paragraph IX of the complaint is a note of E. E. Zaring. Can you state to the Court the circumstances about that note.

Mr. GRINSTEAD.—Now, may it please the Court, we think that this is one of the matters that should be ruled out upon at this time. The bonds are the basis of this action and are in evidence. Those bonds provide by their terms that claims shall be filed within stated times. This Zaring [142] item, as counsel in the questioning has indicated, became a part of the records of the bank in April, 1917, and as indicated in his question, were not propounded in the claim at any time from April, 1917, until the commencement of this action. They were not even included in the formal claim which Mr. Adams presented to the security company and verified on the 9th of June, 1921, more than four years after this instrument became a part of the records of the bank. Mr. Adams has testified he was in charge of the bank in April, 1921. I see no basis in law under which we can be called upon to defend matters that have never been propounded in any claim to the company in accordance with the terms of either of the bonds, and therefore we object to any evidence being introduced under the Zaring claim; and in due course, also, we will object to other items that go in under the same category. That further objec-

(Testimony of T. H. Adams.)

tion we will interpose if any testimony is offered on them.

(Discussion.)

The COURT.—I think, since this is being tried by the Court, I will hear the evidence. If it was being tried by a jury, I would consider the authorities which you have mentioned. In this case, if you are preserving your right of appeal, I would rather let it go in than have it sent back here for retrial.

Mr. MILLER.—I am willing that the objection run to all of this testimony.

Mr. GRINSTEAD.—For the purpose of the record, I make the same objection to the Phillip Richter, October 23, 1920, in the sum of \$2,000 and the A. Walsh claim of August 23, [143] 1920, in the sum of \$1,000. I think that is all, I understand, while this objection goes in out of order, it may be disposed of in the same manner at the present time.

The COURT.—Objection overruled with the understanding that it will be considered on final argument along with all the other points in the case.

Q. Now, then, taking up the next item in this paragraph IX, Warrants, belonging to the Richter estate, state briefly what this is without referring to the book.

Mr. GRINSTEAD.—And without referring to hearsay.

Mr. MILLER.—Yes, I might call on you and Mr. Davis to testify. Go ahead.

(Testimony of T. H. Adams.)

Q. You had dealings with counsel on the other side about these warrants? A. Yes.

Q. Had a written stipulation?

A. I signed a written stipulation which passed into the hands of the attorneys for the Richter estate.

Q. You have not got a copy of it; have you?

A. No, I have not.

Mr. MILLER.—Have you gentlemen a copy of that?

Mr. DAVIS.—I have not.

Mr. GRINSTEAD.—We have in our office at Seattle, but not here.

Mr. MILLER.—I do not know it is very material as to what is in that stipulation.

Q. What about those warrants?

A. Those warrants were put into the assets of the Kelso State Bank on a certain date.

Q. This date mentioned in the complaint, October 23, 1920.

A. Well, without referring to the record, I would not want to run off on a tangent again as I did in the other case. [144]

Q. We will come back to that.

A. But I will say on that date the warrants went into the Kelso State Bank and F. L. Stewart took credit to his personal account for that much and for that amount.

Q. What became of the warrants?

A. The warrants were sold or hypothecated, sold

(Testimony of T. H. Adams.)

under a conditional sale or a repurchase agreement to the United States National Bank of Portland.

Q. By whom?

A. By the Kelso State Bank, through its cashier and assistant cashier.

Q. Well, go on and tell what became of them.

A. They were later redeemed by the Kelso State Bank, but still remained in the possession of the United States National Bank, and were in that suit which counsel are familiar with.

Q. Never mind about that suit. What has become of the warrants?

A. The same counsel, Grinstead and Laube, on behalf of the estate of Phillip Richter caused a demand to be made upon me for the surrender of the warrants, and they were out of my possession and out of my control in so far as the warrants were concerned, but a stipulation was signed by me, and also by the attorneys, to surrender these warrants to the administrator, *de bonis non*, of the Richter estate.

Q. So to be brief about it, these warrants, when you went to take possession of the bank, appeared among the assets of the bank, did they? A. Yes.

Q. And you later, upon demand being made, surrendered them to [145] the Phillip Richter estate? A. Yes.

Q. In what way do the bank books show that the bank suffered a loss by reason of those warrants, through Stewart's manipulation?

A. Well, the warrants have been removed and

(Testimony of T. H. Adams.)

taken from the estate of which he was administrator,—

Mr. GRINSTEAD.—I think we are getting into a little argumentation on the matter in reference to another case entirely from this one.

WITNESS.—I am only quoting counsel.

Q. Was Stewart administrator of the Richter estate? A. He was.

Q. How did the bank get these warrants, as far as the records show?

A. The records show that on a certain date, presumably the date in the complaint, the warrants were put into the assets of the Kelso State Bank and F. L. Stewart took credit to his account for that amount.

Q. Does the record show that these warrants were turned into the bank by Stewart, or the bank paid the money and put it to Stewart's credit for those warrants? A. It shows that.

Q. Give that record. A. October 23, 1920.

Q. These warrants are for \$500 each? Four of them; is that right? A. Yes.

Q. Four warrants for \$500 each? A. Yes.
[146]

Q. You are speaking of them as warrants, what do you mean by warrants?

A. They were warrants of a diking district.

Q. Municipal warrants? A. Yes.

Q. That is diking warrants? A. Yes.

Mr. GRINSTEAD.—While they are looking that up, I do not know what the bank's records are going

to show, but we know something of this transaction. We know that Mr. Stewart apparently took certain warrants, I presume these were a part, out of the Philip Richter estate,—not out of the bank,—and caused them to be placed in the bank so that they became the assets of the bank. I do not know what the record is going to show as to who got credit for them. Those warrants, we also know,—I am making this statement to save time,—these warrants were, as Mr. Adams said, sold to the United States National Bank of Portland, under a repurchase agreement, and later, three days before the bank failed, the Kelso State Bank, through Mr. Stewart, bought the obligations under the repurchase agreement from the United States National Bank, and certain other transactions occurred there, and all of those warrants and all matters pertaining to them, are in the jurisdiction of another court, we contend in another action that has been pending for the past year between counsel here, or between the same parties here, represented by the same counsel. Those warrants are now under the jurisdiction of the United States District Court for the District of Oregon and are passed on an appeal to the Circuit Court of Appeals, 9th [147] Circuit, in which the case was argued a few days ago. In the first place, it is our contention here that this Court can in no way obtain or have jurisdiction to pass upon the ownership of these warrants, or any matters arising out of them as these are all matters that have been threshed out in the other Court.

The COURT.—What was the decision of the lower court?

Mr. GRINSTEAD.—The decision of the lower court was against us but it is on appeal.

Mr. MILLER.—But these warrants were surrendered to you on a stipulation.

Mr. GRINSTEAD.—In that case, it is our contention that this money that was used to repurchase these warrants by the Kelso State Bank was our money, and that is the question that is on appeal to the Circuit Court. There is one other thing that has not been explained that it is necessary to picture, and that is contained in our plea of a setoff in the pleadings. This same company was on the bond of the county treasurer of Cowlitz County, and upon the failure of the Kelso State Bank, our company paid \$46,000 to the county treasurer. It is our contention in this other case, that the moneys that were paid by the Kelso State Bank to the United States National Bank, which is the loss if any, that this bank here has sustained, were moneys of the county treasurer, deposited within 48 hours of the time that the bank was shut up by the bank commissioner at the time it was insolvent within the knowledge of the officers of the bank. So that I say that all of these matters, especially this matter here, is improperly before this Court. [148]

The COURT.—The objection is overruled.

Mr. GRINSTEAD.—In the matter of objections, are we required to claim exceptions at the time, or exceptions understood to go as a matter of course?

(Testimony of T. H. Adams.)

The COURT.—I think the safest theory is to make your exceptions at the time.

Mr. GRINSTEAD.—May I have an exception to the ruling at this time and also the ruling of the Court in the matters that have been passed upon by the Court this morning, in reference to those things that were not propounded in the claim.

The COURT.—Exceptions allowed.

Q. Go ahead.

A. I have Stewart's cage-book of October 23, 1920, which shows warrants discounted, four, \$500 warrants discounted, making a total of \$2,000 and on this date "Individual deposits subject to check" show F. L. Stewart, \$2,000.

Q. Have you got the deposit slip on that?

A. The deposit slip, we have not been able to find it.

Q. Have you got Stewart's ledger account showing that he received that money on that date?

A. I have the ledger account.

Mr. GRINSTEAD.—I do not think it is necessary for that record to be presented. I understand the system of bookkeeping used there, and I understand the individual deposit column here shows that Mr. Stewart took credit on that date for \$2,000, and I will assume, unless I show to the contrary, that that was entered and posted in the proper place in the ledger. [149]

Mr. MILLER.—There is no question about that.

Mr. GRINSTEAD.—There is no question arising on that, we will admit it.

(Testimony of T. H. Adams.)

Q. That date is October 23?

A. October 23, 1920.

Q. Then, Mr. Adams, without wasting further time on that,—do the bank books show Stewart for the \$2,000 on that date? A. The book does.

Q. And these warrants went into the bank?

A. They did.

Q. And they were later surrendered to these people, were they? A. Yes.

Q. What loss did the bank suffer by reason of that? A. Two thousand dollars.

Mr. GRINSTEAD.—I object to that, as that is a conclusion of the witness.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception.

The COURT.—Allowed.

Q. Two thousand? A. It is not a conclusion.

Mr. GRINSTEAD.—The Court has passed on that.

Mr. MILLER.—Yesterday we passed over what is called the Fisk dummy note of \$5,000.

Mr. ADAMS.—\$6,200, isn't it?

Q. \$6,250. I wish you would explain that to the Court,—not what the record shows, but what you found out and know about the Fisk note.

Mr. GRINSTEAD.—Now, again, before the question is answered, I want to keep out hearsay. I understand Mr. Adams is an attorney and understands that. [150]

Mr. MILLER.—No, he is not an attorney, never was admitted.

(Testimony of T. H. Adams.)

Mr. GRINSTEAD.—I thought he told me he was.

Mr. MILLER.—No, he was a school-teacher and went into the banking business.

Mr. GRINSTEAD.—He has been in court so much he knows the rule about hearsay, and I think we have cautioned him enough,

Q. Have you got the Fisk note? For the purpose that the Court may get the connection, you testified yesterday, showing the records on this date, January 19, 1921, that a note went into the bank for \$6,250. You testified to that yesterday?

A. Yes.

Q. And the cage-book indicated that the money went to Stewart, did it?

A. Five thousand went to Stewart and \$1,250 to the Northwest Transportation Company.

Mr. GRINSTEAD.—That is correct, the way he answered it from the record yesterday.

Q. And you of course remember that the deposit slip of that date shows that Stewart took credit for the five thousand dollars?

Mr. GRINSTEAD.—Yes, that shows and that is the note in your hand there. Get it numbered and put it in.

Q. That is the note, is it?

A. Yes, this is the note.

Mr. MILLER.—I offer the note in evidence.

The COURT.—It will be admitted.

Mr. GRINSTEAD.—If the Court please, before this is admitted I will call your attention to the fact that this document on its face shows it is not com-

(Testimony of T. H. Adams.)

plete in that it [151] *is not complete in that it* refers to other documents. As to the further records I do not know what they are, but I would like to have that introduced as a complete document with the other things referred to.

Mr. MILLER.—I do not care, there is a contract in there, entered into between Stewart and this man under which Stewart was to furnish money.

Mr. GRINSTEAD.—You are offering them all together are you now?

Mr. MILLER.—Yes.

The COURT.—They will be admitted.

Thereupon the Fisk note with papers attached was received in evidence and marked as Plaintiff's Exhibit 3.

Q. Mr. Fisk refused to recognize the note?

A. He did.

Q. Denied liability in every manner?

A. In every way and referred to the contract.

Q. The bank suffered a loss of how much on that account? A. \$6,250.

Q. And it went to who?

A. \$5,000 of it went to Stewart and \$1,250 to the Northwest Transportation Company.

Mr. GRINSTEAD.—Of course any conclusion of position taken by Mr. Fisk under that testimony would not necessarily bind us or be binding on the defendant herein, if the Court please.

Mr. MILLER.—All that we care to say is that the bank lost the money and Stewart got it. [152]

(Testimony of T. H. Adams.)

Mr. GRINSTEAD.—Were there some other papers that went with it and went into the bank?

Mr. MILLER.—I don't know.

Mr. GRINSTEAD.—I thought there was. You see that note refers to a contract. Didn't you have it with your other papers that were originally in the bundle? In other words, I want to be sure we get all of it, get the whole story.

Mr. MILLER.—There seems to be a statement from Mr. Fisk.

Mr. GRINSTEAD.—Were those papers you have there part of the files of the bank in connection with this matter?

Mr. MILLER.—I assume—

Mr. ADAMS.—Let me see. I do not know whether they happened to be clipped together or not.

Mr. GRINSTEAD.—My point is, you ought to get the whole thing in.

Mr. MILLER.—That is apparently a statement that Stewart made to Fisk; if you want it it may go in.

Q. Do you know whether these were bank records or just statements that Stewart made to Fisk?

The COURT.—I don't see any use in taking up so much time for that.

Mr. ADAMS.—Put them in there if you want to. It is a statement of their partnership business.

Mr. GRINSTEAD.—I would like to have them in either now or later.

The COURT.—Let them go in.

Mr. GRINSTEAD.—As one exhibit?

(Testimony of T. H. Adams.)

The CLERK.—It's Exhibit No. 3.

The COURT.—I don't see anything to be gained by Mr. Adams' [153] examination of the papers at this time.

Q. Now, Mr. Adams, there are two notes here that we went over yesterday afternoon, one for \$2,200 Kelso Farm Company of \$2,200 of date of February 12, 1921? A. Yes.

Q. And one note for \$3,750? A. Yes.

Q. Of January 15, 1921. The record showed yesterday in going over them, that these notes were taken in by the Kelso bank—that should be February 12, 1921, instead of January as we have it here in the complaint?

A. I don't remember about that?

Q. Well, look and see. Never mind. Anyway the record shows that these two notes went into the bank? A. They did.

Q. Do you know who the Kelso Farm Company was? If you don't know I will have somebody else testify to that. A. No, I don't know.

Q. You don't know?

A. My knowledge would be based on inference from the records and from hearsay around about Kelso.

Q. We will have to bring witnesses to show that. We want to show that this farm—

Mr. GRINSTED.—Will you tell us what you expect to prove by them—

Mr. MILLER.—We will prove that the Kelso

(Testimony of T. H. Adams.)

Farm Company was simply F. L. Stewart's trade name.

Mr. GRINSTEAD.—The Kelso Farm Company was originally incorporated, was it not?

Mr. MILLER.—Yes, but it was disincorporated prior to this [154] and it was simply F. L. Stewart.

Mr. GRINSTEAD.—I think we will concede that to save the time here.

Mr. MILLER.—Save us bringing a witness here.

Mr. GRINSTEAD.—Yes.

Mr. MILLER.—Let that be in the record, that the Kelso Farm Company at this time, at the time the two notes were turned into the bank, was simply a trade name of F. L. Stewart in the operation of a farm—that is, it would have been his if he had paid the mortgage.

Q. The record shows this money was credited to Mr. Stewart I believe you testified yesterday?

A. Yes.

Q. At the same time there were two small items that went to this same company?

A. Kelso Farm Company at the same time received credits—I am not speaking of this particular case—

Q. These are the ones—only these two items of the Kelso Farm in this suit here. (Counsel indicated on statement.)

A. They are the only items made by the Kelso Farm, but I would not be sure we have not claimed

(Testimony of T. H. Adams.)

on notes that are credited to the Kelso Farm account instead of Stewart's personal account.

Mr. MILLER.—The company was disincorporated something more than a year prior, wasn't it, Mr. Davis?

Mr. DAVIS.—I don't remember what date it was.

Q. From that time it was Mr. Stewart's private property? A. Yes. [155]

Q. Mr. Adams, in 1921, have you got the Northwest Transportation Company notes?

A. I have them, but whether they are in the file here or in the file that Mr. Dunham has gone after, I would have to look to see.

Q. Take the Fritz Kruse note. What statement have you got there in reference to the Fritz Kruse note?

A. We have two notes in the sum of \$2,500 each.

Q. You have got two notes signed by who?

A. Fritz Kruse.

Q. How much?

A. Twenty-five hundred dollars.

Q. You have them now as part of the assets of the bank? A. I have.

Q. Now, can you tell the date of those notes?

A. From this transcript before me, which I believe you gentlemen agree to, I cannot tell the date of the note, but I can tell the date it went into the work of the bank. It may have borne an earlier date of a few days.

(Testimony of T. H. Adams.)

Q. Were your present notes renewals of some other notes? A. Yes.

Q. Have you got the records showing the renewals? A. Yes.

Q. Turn to it.

A. Well, you have me slightly confused as to what you want me to do. You want me to get the record or take this transcript which I made of the record, and which I understand Mr. Grinstead—

Q. I want you to show the relation of that note to the note you testified about yesterday? [156]

A. Oh, yes; then, I will go to the record.

Mr. GRINSTEAD.—Will you let me try to see if I cannot prove this for you by an admission?

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—Will you follow this, Mr. Adams, for a moment? As I understand you, you have propounded a claim on a \$5,000 note of Fritz Kruse, dated September 10, 1920. Out of that you are propounding a claim for \$4,880 against us, and that note was later—this is the new part; that note was later renewed into two notes on February 9, 1921.

Mr. ADAMS.—Yes.

Mr. MILLER.—If you will produce those two notes, we are through with that end of the case.

A. There is one of them. The other does not seem to be there. There is but one there now. The other one is just like it evidently.

Q. You have handed me now one note for \$2,500, February 9, 1921, signed by Fritz Kruse. Was this

(Testimony of T. H. Adams.)

found among the assets of the company?

A. It was.

Q. Were there two of those? A. There were.

Q. The other the same amount?

Mr. MILLER.—We will introduce this in evidence.

The COURT.—Admitted.

Thereupon said note, being Fritz Kruse Note No. 1875, \$2,500, February 9, 1921, was received in evidence and marked as Plaintiff's Exhibit No. 4. [157]

Q. Taking up these two Farm Company notes, have you them? A. We have covered them.

Mr. MILLER.—I want to introduce them in evidence?

Mr. GRINSTEAD.—I will call your attention to the fact that the notes bear no revenue stamps.

Mr. MILLER.—I do not think that is a question that can be brought forward to defeat a recovery of this kind, because this man that they had bonded didn't put a revenue stamp on the note.

The COURT.—It will be admitted.

Mr. MILLER.—These are two notes from the Kelso Farm Co., being dated February 19, 1921 and January 12, 1921.

The COURT.—They will both be received as one exhibit.

Thereupon said Kelso Farm Co., Notes of February 15, 1921 and January 12, 1921, were received in evidence and marked as Plaintiff's Exhibit No. 5. [158]

(Testimony of T. H. Adams.)

Mr. ADAMS, being recalled, continued his testimony as follows:

Direct Examination.

(By Mr. MILLER.)

Q. About the Shephard notes, you have charged in this complaint and testified yesterday that there were five Shephard notes, each for \$1,000, Frank Shephard, is that right?

A. Without the documents I cannot remember the numbers.

Q. I am asking you if there were five separate notes? A. There were 14 originally.

Q. As far as this case is concerned? A. Oh, yes.

Q. As far as this case was concerned there were five Shephard notes you testified about?

A. Yes.

Q. Those five separate notes were discounted by the Kelso bank as shown by the record?

A. Yes.

Q. And the money was deposited by Mr. Stewart, that is right?

Mr. GRINSTED.—Generally speaking, yes, there were five notes given.

Q. Do you know Mr. Shephard? A. No.

Q. Do you know what his relations were to Stewart? A. Not from personal knowledge.

Q. Do you know where he lived. [159]

A. Yes.

Q. Where? A. City of Portland.

Q. Where are those notes now?

A. They have been surrendered to Shephard.

Q. Were they formerly in your possession?

(Testimony of T. H. Adams.)

A. They were.

Q. And did they come into your possession as part of the assets of the bank? A. They did.

Q. Were there other Shephard notes besides these that were in the bank?

A. Yes. Without that record that is in the express office somewhere I could not remember just what others, as to whether these notes were older or not. There were some notes there, but some of them had been sold to customers and were returned to me and claims filed for them. There were more than five notes. I have, through a Portland attorney,—

Q. I am getting to that in a minute.

A. I was going to say that there were more than five notes,—more notes than we owned, that is what I am trying to say.

Q. You have the Shephard sheets, showing the Shephard accounts?

A. No, not the ledger sheets, I have our liquidating list of notes.

Q. Will you,—will that show the notes that you have? A. Yes.

Q. Going back to the five particular notes, you surrendered these notes? [160] A. Yes.

Q. Did you have some litigation or some settlement with Mr. Shephard?

A. Indirectly litigation, but not directly.

Q. You had a settlement? A. Yes.

Q. And surrendered these notes on that settlement? A. Yes.

(Testimony of T. H. Adams.)

Q. What did you realize on the notes?

A. Twenty cents on the dollar.

Q. Twenty per cent?

A. Yes. Mr. Grinstead asked me a question a moment ago which I was just trying to answer, whether the twenty cents on the dollar was for the face of the note, or whether it included the interest. [161]

Q. Isn't this one you brought suit on?

A. No, that was not the note that was sued on?

Q. Yes, isn't it? A. Yes.

Q. Not in this suit, but the one in Portland?

A. Yes. That particular note was sued on by the Continental & Commercial National Bank.

Q. In Portland? A. Yes.

Q. Is this note I hold in my hand involved in this controversy here to-day?

A. Only in this way, that the original notes which Stewart took credit for, I cannot tell whether they renewed into that particular note, or did not, until I run through the records.

The COURT.—Then there is nothing on that at the present time.

Mr. MILLER.—I have not finished the Shephard proof yet.

The COURT.—So far as this one note, he is not developing that at all.

Mr. MILLER.—It may be developed later.

Mr. ADAMS.—May I continue just a little bit. I have allowed a claim for the difference between

(Testimony of T. H. Adams.)

twenty per cent, which the Continental & Commercial National Bank received out of it and the face of it, and they have surrendered to me the note. The note is now the property of the bank, of the Kelso State Bank.

Q. This note had been negotiated, had it?

A. Yes. It had been rediscounted by the Continental & Commercial National Bank.

Q. This note seems to have been separated, it does seem to be [162] the same note? A. Yes.

Mr. GRINSTEAD.—Just a moment before you answer, if you will, please.

The COURT.—That is the \$1,000 note.

Mr. ADAMS.—Yes.

Mr. GRINSTEAD.—We move to strike any testimony and object to any further testimony relative to this note as it is not the one sued on or claimed and is not in the pleadings.

Mr. MILLER.—If it is not, we do not claim it is important, and if it is, we will want to develop it.

Q. Those Shephard notes, you have accepted the 20% dividend upon, you have not got them here?

A. No.

Q. Can you show, for instance where you testified yesterday about these notes in the cage-book, what became of the money. From that date on, when was the next renewal on these notes you testified about yesterday.

A. The original notes that were discounted with the bank were renewed from time to time, from the time they came into the bank, until the bank closed.

(Testimony of T. H. Adams.)

Q. That is what I want, have you got a statement there showing that?

A. I have a statement but it is made up for Frank Shephard in conjunction with Northwest Transportation Company, so that it is difficult to run out and if this might go over until later, I can make one for the Frank Shephard notes alone.

Q. We cannot put everything over?

A. I will do the best I can to trace it. [163]

Q. I wish you would do it.

Mr. GRINSTEAD.—I wish he would take one and let me have a chance to check it over. His testimony has been unintelligible to me.

Q. Turn back to where we started yesterday?

Mr. GRINSTEAD.—Take the first of your \$1,000 notes you claim on here, it is the one of April 23, 1920, in your book, your cage-book, and it is April 23, 1920 in your note register. That is the first \$1,000 note of Frank Shephard.

The COURT.—That is one of the five.

WITNESS.—Yes.

Mr. GRINSTEAD.—The defendant understands and is willing to stipulate that the note which was claimed on, the note that was dated April 23, 1920, in the sum of \$1,000 testified to by this witness yesterday, was renewed under date of November 15, 1920, into a note for \$4,000; and that the \$4,000 note was renewed again under date of February 24, 1922. If your records confirm that, it saves time.

Q. Is that correct?

(Testimony of T. H. Adams.)

A. I assume that it is perfectly correct. I could not tell absolutely.

Q. That is the history?

A. Just a moment, let me tell it. There was a \$4,000 note taken in at that time, and a \$4,000 note paid, but without running back through them I could not be positive, but I assume there is no question.

Mr. GRINSTEAD.—Of course, in any of this stipulation, I don't want to mislead anywhere. I can only give you the best of our checking in order to save time.

Mr. MILLER.—If you agree that the records show that, we are [164] satisfied.

Mr. ADAMS.—We are satisfied with it, yes.

Mr. GRINSTEAD.—If it is all right, I can take the next one in the same way. The next one, as Mr. Adams testified, came up out of a cash disappearing proposition,—carried for a year and disappeared; July 19, \$1,000. It appears in the note register, according to the testimony yesterday. If you will follow the renewal on that, I will stipulate as follows:

Mr. ADAMS.—I think I will turn to the register.

Mr. GRINSTEAD.—That note followed practically the same course as the preceding one, renewed November 15, 1920, into the \$4,000 note and then on February 24, 1921, that \$4,000 note was renewed again into another \$4,000 note; in other words, those two made two thousand of the \$4,000 note.

(Testimony of T. H. Adams.)

The COURT.—When you speak of the \$4,000, it is the \$4,000 note we have here?

Mr. GRINSTEAD.—Yes.

Q. The notes amount to \$4,000?

Mr. GRINSTEAD.—On a certain day there would be a group of notes taken up and a new note for the whole principal amount issued, and some disposition would be made of the interest.

The next one is August 13, 1920, that is the date in the note register, and the date in the cage-book and the date on the deposit slip as testified by this witness here yesterday. That note went identically the same as the other two. That makes \$3,000 according to our figures.

Mr. ADAMS.—Yes, the way we have it. [165]

Mr. GRINSTEAD.—The next one is a note of August 13, 1920, the same date, and that went the same way, and that makes up your \$4,000 of notes. The renewed one is the \$4,000 note and then that note was renewed again.

Mr. MILLER.—The last renewal,—

Mr. GRINSTEAD.—February 24, 1921.

Mr. MILLER.—And this bank failed on,—

Mr. GRINSTEAD.—March 17, 1921.

The other Frank Shephard note appears in the note register and as testified here yesterday, under date of September 29, 1920, was renewed on November 15, 1920, and according to our records, was sold to R. Oyster by this bank. That is our record of the fifth note.

(Testimony of T. H. Adams.)

WITNESS.—We have a note sold to Riley Oyster. I think we better get our record on that.

Mr. MILLER.—On the last one.

Mr. GRINSTEAD.—I would be glad to have you do that on that sale because that is the way our record shows.

WITNESS.—This Oyster note does not appear in our records at all, and Mr. Dunham's conclusion is that is not the renewal of that date.

Mr. GRINSTEAD.—I do not want to be bound by Mr. Dunham's conclusion.

WITNESS.—I did not mean to talk for the record.

Mr. GRINSTEAD.—Go ahead with that understanding.

WITNESS.—We had a \$5,000 note paid on that date and we got one \$4,000 note back and one \$1,000 note does not appear in here at all.

Q. So that it must have been sold?

A. It must have been, that one was sold, yes.
[166]

Mr. GRINSTEAD.—I want to know whether counsel stipulate on that.

Mr. MILLER.—We will stipulate just as he now testifies the record shows.

The COURT.—You are claiming \$4,000 on this or \$5,000.

Mr. MILLER.—We were claiming \$5,000.

The COURT.—And you are saying that they have no showing except as to four.

Mr. GRINSTEAD.—I am saying more than that

(Testimony of T. H. Adams.)

before we get through with it, but the other note appears in their record as sold and Mr. Adams has just said it does not show who it was sold to, but it traces back into cash, apparently.

WITNESS.—It is that way.

Mr. GRINSTEAD.—May be stipulated as correct?

Mr. MILLER.—Yes, all right.

We have this stray Kruse note.

Mr. GRINSTEAD.—You have register No. 1876 there?

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—Put her in.

Thereupon said Kruse note No. 1876 was offered and received in evidence and marked as Plaintiff's Exhibit No. 4.

Mr. GRINSTEAD.—One of them went in this morning as Exhibit 4, and the clerk is numbering both of them as Exhibit 4.

Mr. MILLER.—Now, we will take up the Phillips notes, a series of them.

Mr. ADAMS.—I have, them.

Q. Do you know Mr. Phillips? A. Yes.

Q. During this transaction, where was he living?
[167]

A. During the transaction involving these particular notes, he was living down in Fruit Valley below Vancouver a mile or two.

Q. Do you know whose place he was living on?

A. Yes, he was living on a place he owned, technically.

(Testimony of T. H. Adams.)

Q. Who had he acquired his technical rights from? A. From Stewart.

Q. Was he a person of any financial responsibility.

Mr. GRINSTEAD.—I think that is immaterial.

The COURT.—Overruled, if you know. If you know at the time the notes were taken what his standing was financially, you may state.

Mr. GRINSTEAD.—I would either like to be heard, or an exception.

The COURT.—Exception allowed.

Q. Do you know, Mr. Adams?

A. I only know from his statement to me.

Q. Do you know yourself, other than what he may have told you as to his responsibility?

A. I know, at the time of these notes.

Q. That is what I am trying to find out.

A. But not at the time he bought the farm from Stewart.

Q. How about the time when you made these notes?

Mr. GRINSTEAD.—That is objected to as immaterial. These are merely renewal notes.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception please.

A. Please state the question.

Q. I want to know whether he was a person of any financial standing or not at the time he made this note? [168] A. No, he was not.

Q. Have any particular property at all?

A. Nothing but an imaginary equity in that farm.

(Testimony of T. H. Adams.)

Mr. GRINSTEAD.—I object to that as merely a conclusion, vague and indefinite, and not within the issues in pleading in this case,—merely the conclusion of the witness.

The COURT.—That word “imaginary” may be stricken out and disregarded. Exception. Objection overruled, motion denied.

Mr. GRINSTEAD.—Exception, please.

The COURT.—Allowed.

Q. Now, did you come into possession, as an officer of this bank, of a lot of Phillips’ notes?

A. I did.

Q. Any considerable amount in addition to those mentioned in this controversy? A. Well,—

Mr. GRINSTEAD.—I object to that as immaterial.

Mr. MILLER.—I want to show his relationship with Stewart.

The COURT.—Objection overruled, but give me some idea how much these Phillip notes amount to.

Mr. GRINSTEAD.—Perhaps I can do it quickly here. I can give you our record. One note March 20, 1918, \$1,500; second note of the same date, same amount.

Mr. MILLER.—These notes involved in this controversy, is that what you want to know?

The COURT.—Yes. I want to get clear what you are talking about.

Here counsel for the plaintiff read to the Court the testimony heretofore given by the witness Adams in reference [169] to the Phillips notes.

(Testimony of T. H. Adams.)

Mr. GRINSTEAD.—There is a claim here of \$57.90, \$1,500, and \$500. Those three mentioned are March 20th in their note register. As a matter of fact, the \$194.00 should not be mentioned in connection with these notes he is proving on because it does not go into them.

Mr. MILLER.—The first item in yesterday's testimony was a claim of \$69.90, the next was a claim of \$1,500, and a second of \$1,500.

The COURT.—I do not see the advantage of repeating that.

Mr. MILLER.—Just that we may get the amount of these Phillips notes. It runs through quite a lot of testimony.

Mr. GRINSTEAD.—They are charging us \$67.90 out of \$194.

A note that went into the register on March 20, 1918, but it is not involved in these renewal notes that are under discussion here.

Mr. MILLER.—The next note is \$1,500.

Mr. GRINSTEAD.—On March 20, 1918, No. 7667.

Mr. MILLER.—And another note for \$1,500.

Mr. GRINSTEAD.—That is correct, the same date.

Q. And the next note we have here is \$550.

Mr. GRINSTEAD.—Yes, it is a \$550 note under date of March 20, but you pleaded it as \$500.

Mr. MILLER.—But in the notice served on you, it is \$550.

Mr. GRINSTEAD.—\$550, correct.

Mr. MILLER.—The next note was \$1,500, but

(Testimony of T. H. Adams.)

there was a charge against you of \$500.

Mr. GRINSTEAD.—That is correct, under date of April 11, 1918.

Mr. MILLER.—Then there is a charge of \$38.70.
[170]

Mr. GRINSTEAD.—Yes, a \$600 note, dated April 5, 1920.

Mr. MILLER.—That is the amount that is involved in the Phillips notes.

Mr. GRINSTEAD.—That is all of the Phillips notes, but not all of these go into these renewals here.

Mr. MILLER.—That is a question we will develop now.

Q. I will hand you these notes, Mr. Adams, what are they? A. Notes of H. D. Phillips.

Q. How many of them have you here?

A. I have five.

Q. Where did you get them?

A. They were in the bank.

Q. Were they among the assets of the bank?

A. They were.

Q. Are known as the Phillips notes here?

A. They are.

Q. Have they been renewed from time to time?

A. Yes.

Q. From where they were originally executed as shown in your testimony heretofore? A. Yes.

Mr. MILLER.—Is there any objection to these being introduced in evidence?

(Testimony of T. H. Adams.)

Mr. GRINSTEAD.—Not until we trace,—I am not straight with you on them yet.

Mr. MILLER.—All right.

Mr. GRINSTEAD.—If we can agree on the tracing of these, yes. I do not want to agree to too much.

Mr. MILLER.—Can you tell by the numbers?

Mr. GRINSTEAD.—The first one you have is \$67.90,—the \$19 [171] note where you are charging us with \$67.90, and traces, according to our tracing, into a note of January 4, 1919 in the sum of \$900, which renewed into a note of March 7, 1919, of \$1,500. That renews again into a note, April 5, 1919, in the sum of \$1,500.

Mr. ADAMS.—Yes.

Mr. GRINSTEAD.—And that renews again into a note of \$1,500 under date of September 10, 1919, which is not any one of these notes here, and we do not trace it into these notes of 1920. Apparently that goes into the note of \$1,500 of September 10, 1920. I made a clerical error in copying my notes on this book.

Mr. ADAMS.—I have it right here.

Mr. GRINSTEAD.—So long as we do not get caught twice on this note, I am willing to concede that the note there is the one although the date of the note is different.

Q. What is this you have in your hand, Mr. Adams?

A. This is a ledger account we have made up

(Testimony of T. H. Adams.)

of these matters. This is not the bank's ledger, this is my ledger.

Q. Showing the tracings of these notes.

A. Yes, showing the amount that Phillips owed at any time. Just such a ledger as I keep in my own bank.

Q. Tracing those notes, from the time they were made down to this time?

A. Absolutely. The only trouble just now is that the note we have been tracing, No. 8846,—

Q. How? A. April 5.

Q. No. 8846?

A. There are several of them, '47, '48 and '49. It is one of [172] those. But these notes went into the new register that was open and have been given a new number, and carrying them forward in our ledger account, they are carried forward under a new number.

Mr. MILLER.—Have you any objection to introducing that as a copy of the records, showing the renewals of these notes?

Mr. GRINSTEAD.—Who prepared that?

Mr. ADAMS.—Mr. Dunham did the clerical work. Of course, I checked them over.

Mr. GRINSTEAD.—I am willing to stipulate to save time here,—I do not know whether this is exactly correct or not, but I will stipulate that the various Phillips notes that were running through the bank all merged down into a group of notes in Sept. 1920, two of \$1,200, two of \$2,000 and one of \$1,500.00 which I am willing to agree are those,

(Testimony of T. H. Adams.)

provided you tell me you have not got another bunch.

Mr. ADAMS.—You are absolutely safe.

Mr. GRINSTEAD.—These are all of the notes the bank had and these are the identical notes you had when you took charge?

Mr. ADAMS.—Yes.

Mr. GRINSTEAD.—And they are all of the Phillips notes?

Mr. ADAMS.—Yes.

Mr. GRINSTEAD.—I do not care whether they are identical or not.

Thereupon the Phillips notes were offered and received in evidence and marked as Plaintiff's Exhibit No. 7. [173]

Mr. MILLER.—Have you got the Northwest Transportation Company notes? A. Yes.

Q. There was one note for \$2,500, dated 4/3/20, for which the entire amount is charged against Stewart. There was one for \$5,000,—

Mr. GRINSTEAD.—The one of September 1st is really the one you are charging us with, \$2,104.78

Mr. MILLER.—The one of \$5,000 of September 1st, 1920, for \$5,000 we charge them with \$2,104.78. Then there is one of the 17th of November, 1920, \$2,000, charge made against them of \$43.80; and another one of the 10th of March, 1921, I believe, \$2,000, and the charge is \$450; and one note of the same date, March 10, 1921, note of \$1,250 and \$800 is chargeable. That is the Northwest Transportation Company. I have a lot of Northwest Trans-

(Testimony of T. H. Adams.)

portation Company notes here. I do not know whether you can pick out the ones merged in these. Here is one of \$1,250 which I will hand you, that is under date of March 10, 1921, originally \$1,250, and \$800 is charged,—

Mr. GRINSTEAD.—Of course, you mean that is the note record, it is not the note.

Mr. MILLER.—It is made the same as the note.

Q. What can you say about that note, the one you now hold in your hand?

A. That note is one that was in the bank when I took charge.

Mr. GRINSTEAD.—Subject to objections, we will reach later on, that may be considered as identified, that note of \$1,250 of March 10, 1921. You may introduce that subject to objections we are going to urge as to other reasons. [174]

Mr. MILLER.—There is no objection as to it connecting up.

Mr. GRINSTEAD.—I think that may be the original note.

Q. Is that the original note?

WITNESS.—I wanted to see whether that is not the original note, are you saying it is not the original note?

Mr. GRINSTEAD.—It is. It is not a renewal according to our tracings.

Mr. MILLER.—I will not introduce it until we get through with the Northwest notes.

Q. We have charged them with \$2,500 note, the

(Testimony of T. H. Adams.)

third day of April, 1920. Have you any note now that that note merged into. A. We can trace it.

Q. All right, trace it,—into which one of these notes we have here now?

A. That traces into the note which you have in your hand, in part, \$2,000 of it traces ultimately into that note.

The COURT.—That traces into the \$5,000?

A. Yes.

Q. Can you tell what became of the other \$500?

A. Yes, that was picked up and went into another note of \$700 at a later date.

Q. And what became of that note?

A. \$500 went into No. 1847, which you have there, have you not?

Q. Yes. A. Of \$2,500.

Q. That was No. 1847, the registered number?

A. 1847, registered number.

Q. And \$2,000 of it went into a note that is designated as 1708, \$5,000? A. Yes. [175]

Q. The \$2,500 note is No. 1847? A. Yes.

Q. The way you have it, the \$2,000 went into the large note and the \$500 went into the \$2,500 note?

A. What is the number of the larger note, 1708?

Q. Yes? A. Yes, sir.

The COURT.—I certainly do not understand what that \$500 went into.

Mr. MILLER.—We have another here of \$2,500, No. 1847.

The COURT.—The \$500 traced into that?

Mr. MILLER.—Into that one, yes.

(Testimony of T. H. Adams.)

The COURT.—Then to trace it into \$700 is a mistake.

Mr. MILLER.—No, there is no \$700 traced here.

WITNESS.—Yes, that is a mistake in the date on the note register.

Q. Then how does it stand now, that the \$500 went into?

A. The \$500 went into No. 1847 of \$2,500. \$2,000 went into 1708 of \$5,000.

Q. There is a charge of \$43.80 out of the \$2,000 note, is that shown in any of these notes?

A. What is the date of that?

Q. The 17th of November.

A. It is not shown on these notes.

Q. It may be shown in the other evidence. If you could turn to the cage-book of that date and see whether that was the note.

Mr. GRINSTEAD.—You have already testified to that and traced it all regularly.

Mr. MILLER.—The \$43.80? [176]

Mr. GRINSTEAD.—The original register number is 1480.

Mr. ADAMS.—Yes.

Mr. MILLER.—Then, where does it go into, what note. Well, if you cannot find that \$43.00 it is not worth spending a great deal of time for.

A. Well, I found what happened to that note, the date on which it was contended that No. 1480, November 29, was cancelled and a cash item carried for it for a while.

Mr. GRINSTEAD.—Perhaps I can satisfy you

(Testimony of T. H. Adams.)

that you would like to waive it and drop it. I will tell you what happened to that, it is a small item.

Mr. MILLER.—All right.

Mr. GRINSTEAD.—Mr. Stewart paid out \$43.80 interest, \$3.00 protest fees, eighty cents for revenue stamps and Miss Waugh made a duplicate deposit slip on November 17, 1917, in connection with some discounted Northwest Transportation notes and he paid out the money and it is in Miss Waugh's own handwriting on the deposit slip. I think you are wasting time.

Mr. ADAMS.—We know it to be in Miss Waugh's handwriting. That item was testified yesterday as appearing in Miss Waugh's writing, wasn't it?

Mr. GRINSTEAD.—Yes, that is correct.

Q. Let's take up the next one. The next one is a note for \$2,000 the Northwest Transportation Company of the 10th of March, 1921, \$450 chargeable.

A. Well, that is conceded to be, as I understand, an original note. \$450 went to Stewart's account.

Q. Which one of these notes is that out of?

A. \$12,500. [177]

Mr. MILLER.—We have covered that already.

Mr. GRINSTEAD.—No.

Mr. ADAMS.—Well, I'll see,—

Mr. GRINSTEAD.—That is what your record shows, but it is not what your pleadings show.

Mr. DAVIS.—You are claiming \$450 out of the \$2,000?

Mr. GRINSTEAD.—Your testimony yesterday

(Testimony of T. H. Adams.)

traces it out of the Northwest Transportation Company note of \$2,000.

WITNESS.—I think you are mistaken.

Mr. MILLER.—Turn to that record and see, March 10, 1921. What have you got there now?

A. March 1st, 1921, under individual deposits, Stewart is credited with \$450, Kelso Farm, \$800. On the reverse side, or on the opposite page, cash item of \$250 is initiated, which goes out on March 10, when this note of \$1,250 comes in.

Q. I am speaking now of the other one, \$450 out of the \$2,000 note.

A. Well, it is not out of the \$2,000 note. It is out of the \$1,250.

Q. The other \$450?

A. There is but one, is there, at this time?

Q. You testified yesterday \$450 came out of the \$2,000?

A. I know it did, but I went over it and corrected it again.

Q. In this notice we served upon them, we say that \$450 came out of the \$2,000 note, is that a mistake?

A. That is a mistake, owing to the fact that a \$2,000 cash item went out on that same day, and a \$2,000 note went in, but running it back, the \$2,000 note and the \$2,000 cash item originated differently from this \$1,250, and the [178] \$1,250 originates on the day that these two credits are taken.

Q. So that this \$800 you have already testified

(Testimony of T. H. Adams.)

to, and the \$450 would come out of the \$1,250 note?

A. Yes.

Mr. GRINSTEAD.—For the sake of wanting to keep our record straight, I object to any testimony attempting to charge us with an additional \$1,250 or \$450 out of the \$1,250 note, as incompetent, irrelevant and immaterial, not within the pleadings, not in accordance with the claim filed with the surety company under the terms of the bond.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception.

The COURT.—Exception allowed.

Q. That is all of the Northwest Transportation Company's notes, is that right now? There is \$800 and \$450 that came out of the \$1,250 note?

A. Yes.

Q. Of the \$2,500 note, \$2,000 is in the \$5,000, and \$500 is in the \$2,500? A. Yes.

Mr. MILLER.—We offer these in evidence.

Mr. GRINSTEAD.—Which ones are you offering?

Mr. MILLER.—The \$5,000, \$1,250 and \$2,500.

Mr. GRINSTEAD.—You are leaving out the \$2,000 entirely.

Mr. MILLER.—Yes.

Thereupon said notes of the Northwest Transportation Company for \$5,000, \$1,250 and \$2,500 were received in evidence and marked as Plaintiff's Exhibit No. 8. [179]

Mr. GRINSTEAD.—May I ask a question? Do I understand then that of those two thousand dol-

(Testimony of T. H. Adams.)

lars that you sue us on, on the note dated March 10, 1921, you are not claiming anything against us.

Mr. MILLER.—In the notice served upon you, we claim \$450 out of that.

Mr. GRINSTEAD.—You are claiming that out of the \$1,250 over my objections and are not claiming it out of this \$2,000 note, is that correct?

Mr. MILLER.—That is the way we understand it.

(Recess.) [180]

Cross-examination.

(By Mr. GRINSTEAD.)

Q. Now, just as a preliminary, I asked you to produce the minutes of the board of directors. Now, your counsel has handed me this book and this other file. Can you identify those?

A. This book I found among the records of the Kelso State Bank and shows to be an old minute-book.

Q. That was in the records of the bank at the time you took charge and has remained that way until this time? A. Yes.

Mr. GRINSTEAD.—May that be identified?

Minute-book referred to marked for identification as Defendant's Exhibit 1-A.

Q. This second bunch, what is that?

A. This bunch clipped together here contains minutes of the board of directors and stockholders of the Kelso State Bank for the later period, and I wish to explain to the attorneys and the Court that when I took charge of the bank these minutes

(Testimony of T. H. Adams.)

were bound in a looseleaf binder. When I sold the building and furniture and whatever the bill of sale called for, that was not necessary in the liquidation, after I sold that to the Cowlitz Valley Bank they found these papers with the minutes in them and they took the minutes out of the binder and rolled them up in a roll and laid them away. I later found them in that condition and as they had appropriated the binder and put them in, such shape it would not be practical to use them, Judge Miller has clipped them together in that form.

Mr. MILLER.—There is quite a lot of stuff in there that is [181] not strictly a part of corporate records.

Mr. ADAMS.—But they had been bound into the loose leaf.

Papers referred to were identified as Ex.

2-A.

(By Mr. GRINSTEAD.)

Q. At the time you took charge of the bank there was in the records of the bank as I understand of course the ledger sheets pertaining to Stewart's personal account and a great many cancelled checks that Stewart had issued on the State Bank of Kelso for years past? A. Yes.

Q. But not a complete file?

A. I think Mr. Davis can tell a great deal more about that than I can.

Q. That is your understanding, isn't it.

A. That is my understanding.

Q. Have you brought up here all of the checks

(Testimony of T. H. Adams.)

signed by F. L. Stewart that you have been able to locate?

A. I think I can answer that in the affirmative, as far as I know I did.

Q. Those are the checks which we have been examining here since the trial started,—or you let us have them.

A. I don't know you have them. I suppose you have them.

Mr. DAVIS.—I got Judge Miller's consent.

Mr. MILLER.—You are free to examine anything we have got.

Q. Now, in going over these several items, some 51 items, on which you base a total claim against us in the sum of some \$54,000 or more, I will ask you if it is not a fact that that claim is based upon these facts, as propounded by you: that whenever you found a note going into the bank and a credit out of that note going to Mr. Stewart— [182] if that note was not paid—you made that a basis of a claim against us?

A. I think I got your question and can answer in the affirmative, if I understand the question.

Q. In other words you propounded your claim whenever you found that Stewart had taken credit out of any note that remained unpaid in the bank?

A. That is not—in a sense that is correct, Mr. Grinstead, and in a sense it is not.

Q. Well, qualify it if you wish in any way you wish?

A. I will explain exactly how that was arrived at.

(Testimony of T. H. Adams.)

I took a suspicious note, I mean a note we deemed of little value or no value, worthless, and traced the note to its beginning. We traced just a few of those and we found that frequently Stewart got credit on them.

Q. Of all or a part of the note?

A. Something out of some of those notes, not all of them. Then I had Mr. Dunham with my supervision and help trace a great many of those notes that we deemed worthless or of little value, and in those or out of those that we found no profit inuring to Stewart we simply put aside.

Q. When you say profit, do you mean you traced to see whether he gave full value received when he took all or a portion of any of those notes in this claim, or that the mere fact that a credit had been given Stewart was sufficient as a basis of the claim?

A. Well, I did not trace to see whether he gave value because I was not concerned,—he could not give value as far as the bank was concerned.

Q. Well, of course, we are not arguing. All I want to do is [183] to get at the basis on which the claim was made. As I understand it then, if you found an unpaid note and Stewart had a dollar out of it, or a part of it, to the extent that he did get credit, that became the basis of the claim?

A. Yes. If we found in the notes,—we did not search anything that we deemed of any value. There may be good notes that Stewart profited in or took credit for a part of it, but we never made

(Testimony of T. H. Adams.)

any analysis of those. We made an analysis of the notes that became a loss or worthless.

Q. Then you think there may be others, or do you know whether there were other notes that went through just the same procedure when they went into the bank, and the credit went to Stewart's account, and those notes were afterwards paid, or you consider them good and therefore did not claim on them?

A. I do not know, because we never analyzed anything of the kind.

Q. As a matter of fact, isn't it true that there are other notes in the records of the bank which you have examined where, when they were deposited, all or a portion of the notes went to the credit of Mr. Stewart's personal account?

A. Oh, I think there are probably a great many.

Q. A great many?

A. Yes, notes that are really out of the bank and gone.

Q. Did you ever check out on any of those notes to see why Stewart was getting credit from those notes? A. On these that we make claim on?

Q. Yes, or any others?

A. Yes, I have, that is a little difficult question to answer, [184] because in checking that all I could do would be to take my own deductions as to why he got the credit.

Q. Well, here is what I am getting at; You have charged us with Mr. Stewart appropriating,—in this claim of yours and in your pleadings,—

(Testimony of T. H. Adams.)

those credits. Now, have you ever checked out to see whether he got those as his own money out of these other people's moneys, without giving value received?

A. I may be dense, but I do not get anything out of that question.

Q. Might it not be a fact on some of these claims, so far as you know, that when Mr. Stewart took a credit for a certain amount he had actually parted with something of value out of his bank account to the same amount,—might that not be true?

A. On the same day, the same time?

Q. Not necessarily the same time, but at any time.

A. I never looked to see as to that.

Q. Now, let me ask it as an illustration,—this is all preliminary in a way: take one of these \$150 notes you have running in here, the Wallace note, we will say? A. Yes.

Q. Might it not have been true that Mr. Stewart was paying the rent of the premises occupied by Wallace & Mosier, and then, as they gave notes to the bank, which the bank took, he would get his money back as monthly installments of rent?

A. Might have been for anything that I have found or know.

Q. And is that same thing true as to all of these matters, whether any of these notes that you sue on here, where you [185] have traced it out and know that he did not give value received at some time or other for that?

(Testimony of T. H. Adams.)

A. You mean value received to the bank or value received to the individual that he got the note from?

Q. To the individual that he got the note from.

A. Perhaps some of those,—I know he did not give value to the individual he got the note from, but I never considered that point, because it did not make any difference.

Q. Of course, that is a conclusion, that is not up to me to argue.

A. I might say that was my conclusion.

Q. I asked you whether you ever traced it to see whether that fact was true?

A. I never did, except in probably one or two cases. I did not trace for them then, that came up incidentally.

Q. What one or two cases do you refer to?

A. Howard S. Amon is one.

Q. Do you think of any other?

A. Well, now, Mr. Grinstead, if I could begin at the beginning,—let's take the Fisk dummy note.

Q. You make an exception on the Fisk dummy note?

A. No, I am not making any exception of it. I am just trying to get at the point whether I understand your question or not.

Q. Let me try them?

A. Let me turn the question and place the inquiry this way: Let us assume that he put up all of this money for Mr. Fisk, for this \$6,250,—is it then your question to me, do you ask me whether

(Testimony of T. H. Adams.)

I have investigated to find whether he gave Fisk \$6,250 or whether their accounts did not [186] balance as to that.

Mr. GRINSTEAD.—Of course, the Fisk note, not being signed, is distinguished from any of the other notes and it is all right to call attention to it, but it begs the question as to the rest of them.

A. I will take the next one, the Phillips note of \$1,500.

Q. Yes.

A. Do you mean to ask me whether Stewart cheated Phillips when he sold him the ranch that he had an interest in, or whether Phillips got \$1,500?

Q. You understand that these notes that went into the bank were notes that were given Mr. Stewart in payment for the farm that Phillips bought, do you? A. I do.

Q. And that went into the bank, went into the bank's records, at the time the records show?

A. That is my understanding.

Q. Then you and I understand that. Now, are there any others where you say that you know that Mr. Stewart did not give value received for every credit that he took?

A. Well, I am saying, Mr. Grinstead, that note and all of these that come up, has never been primarily considered by me. If you want to ask me the question if I have investigated to see whether Mr. Stewart was out of pocket the amount of money represented by the note,—

(Testimony of T. H. Adams.)

Q. By the credit that he took, you mean?

A. Well, by credit, yes, by credit, by his appropriation of the note, I meant to say,—

Q. Yes.

A. I never considered that at all except as it has come incidentally [187] sometimes.

The Court here adjourned until ten o'clock the following morning.

October 29, 1922, ten o'clock.

The trial of this case was continued as follows:

Mr. ADAMS, being recalled, continued his testimony as follows:

Direct Examination (Continued).

(By Mr. MILLER.)

Q. Mr. Adams, will you get the claim that was presented to the company, of which they have a copy.

(Witness produced papers.)

Is that the claim in the form in which it was presented to the defendant company?

A. Yes, I think it is an identical carbon.

Q. Were these analyses attached to it?

A. Yes, those are carbon copies of the analyses presented to the company.

Mr. MILLER.—I think it is admitted that this was presented.

Mr. GRINSTEAD.—So far as I can see, this is a copy of a claim presented and the correspondence accompanying the claim presented to this company. There is no objection to the fact that it is a copy.

It is objected to as immaterial, irrelevant and incompetent, and particularly for the reason that each and all of the items making up that claim [188] were not propounded timely within the terms of the bond sued on herein.

The COURT.—The objection overruled. It will be admitted.

Mr. GRINSTEAD.—We wish an exception.

The COURT.—Allowed.

Thereupon said copy of original claim was received in evidence and marked as Plaintiff's Exhibit 16.

Mr. MILLER.—I do not know whether you admit receiving that claim.

Mr. GRINSTEAD.—I will concede that the claim was received in the mail in due course, following the date of the letter that accompanies the claim in Exhibit 16. The letter accompanying Exhibit 16, bears date of June 9, 1921.

(By Mr. MILLER.)

Mr. MILLER.—While we are in the bank records, I want to offer in evidence the commissioner's report showing the recognition [189] of the bond. I have the State Bank Examiner's report of the condition of the bank for 1916, and I want to offer in evidence this line, under the title of "Officers and employees,—amount of bond": "Cashier, F. L. Stewart, Bond, \$25,000." It is simply for the purpose of showing that the State Department recognized the bond given by the bank

cashier in this case and it is merely on the point that I wish to urge that it is an official bond.

The COURT.—It will be admitted.

Mr. MILLER.—I have read it into the record.

Mr. GRINSTEAD.—You do not need to put this in for the present if you don't want to. Of course, the Court has said as to this line that it is admitted, but we want to be heard on this point. Here is the State Examining Officer who is requested to make an examination of the records of the bank,—what they show, now the thing that counsel has offered is a line in here showing that F. L. Stewart is bonded and draws a salary of \$2,400 a year, and the bond is in the amount of \$25,000. I would rather have the whole record go in than to have one line of it. We are entitled to the whole document, and on that document being offered, we would object as not tending to prove any issue in the case.

The COURT.—Mr. Grinstead is entitled to it. It will be admitted, the whole document.

Mr. MILLER.—Of course, we will have the right, with all these matters, to withdraw these documents after the case is over with.

The COURT.—Yes, either on stipulation or by substitution of copies. [190]

Mr. GRINSTEAD.—We are agreeable that copies be substituted of anything. What we are contending for in our objection,—I want the Court to allow me an exception,—is that these reports are not binding upon us in any way and are in-

(Testimony of T. H. Adams.)

competent and immaterial in tending to prove any material controversy in this litigation.

The COURT.—I understand Judge Miller treats this as recognition of the bond as being the bond required by law, and I overrule the objection. It will be admitted.

Mr. GRINSTEAD.—Allow an exception in the record.

The COURT.—Allowed.

Mr. MILLER.—The same thing is covered in the Commissioner's report for,—

Mr. ADAMS.—It is not covered in the '17. '17 is on an old form which did not give a space for it.

Mr. MILLER.—'18, '19 and '20 and '16 have been offered in evidence.

The COURT.—Admitted.

Mr. GRINSTEAD.—All over our exceptions.

Thereupon said reports of the Bank Examiner for 1916, 1918, 1919 and 1920 were received in evidence and marked as Plaintiff's Exhibit 18. [191]

Q. Now, in the books there are two Phillips notes, \$1,500 each, of the 20th of March, 1918. Mr. Adams, referring to the note of H. G. Phillips, March 20, 1918, one for \$1,500 and a second for the same amount. It was testified by you when you were on the stand the other day that these notes,—that the proceeds of these notes, the money, went into the guardianship matter, in which Mr. Stewart was guardian. What does your book show in reference to that?

(Testimony of T. H. Adams.)

Mr. GRINSTEAD.—What is the purpose of this?

Mr. MILLER.—We want to show that Mr. Stewart took money out of the guardianship matter, and then replaced it again with the proceeds of these notes.

Mr. GRINSTEAD.—I do not see the materiality of going into the guardianship matter here. He covered the entries that to to the question of the liability sued on here.

Mr. MILLER.—I do not think it was quite completed at that time. I think we left it for a further showing as to how the money came to be paid into the guardianship matter of which he was the guardian.

Q. What have you got there,—go ahead and testify about it.

A. I cannot remember how much of this will be repetition.

Q. Go on with it, we can stop you.

A. Well, on the 20th of March, 1918, reading from Stewart's cage-book, on that date, two notes, or more than two, but these two particular notes of \$1,500 each under "Notes Discounted" were taken in the name of H. D. Phillips or H. D. Phillips notes in the same amount of \$1,500 each went into the work on that date.

Q. Were discounted by the bank on that date?

A. Were discounted by the bank on that date.

[192]

Q. And the cash item went out?

(Testimony of T. H. Adams.)

A. And a cash item of \$3,200 went out.

Mr. GRINSTEAD.—However, on the 11th of March,—just to save a little time,—is the origin of the cash item, and you said that had something to do with the Deering estate? A. Yes.

Q. Now, did you say that Stewart got that money from the Deering estate on the book?

Mr. GRINSTEAD.—That is immaterial. If the cash item went in and went out of the bank on the 11th, it has not anything to do with the issues in this case. The issue in this case is that the Phillip note went in, and he testified about it, on the 20th of March.

Mr. MILLER.—We also want to show that Stewart, previously, just before that, had taken the money out of the estate of the guardian, for the purpose of showing that he did use this money to replace what he had taken out of the guardianship matter.

Mr. GRINSTEAD.—These books show what became of the notes. If you are trying to show dishonesty in connection with some matter that is extraneous to this litigation, I am objecting to it. I think that is the only purpose of the testimony.

The COURT.—If he appropriated the money of the estate and then appropriated money of the bank to square his appropriation with the estate, why it would seem to be an appropriation of the bank.

Mr. GRINSTEAD.—What you are forcing us to do in order to meet [193] this on rebuttal, is

(Testimony of T. H. Adams.)

to go into something we know nothing about, namely, the administration of the Deering estate. It has not been pleaded. It has nothing to do with the issues here.

The COURT.—The day that this cash item of \$3,200 went out, what date was that?

WITNESS.—It went out on the 11th of March.

Q. I get it that your cage-book shows the two notes came in on March 20th? A. Yes.

Q. In a cash item?

A. It came in on March 11th.

Q. In or out?

A. Came in. In other words, there was originally, on March 11th, a cash item that went out or was neutralized or balanced with these notes that went in.

Q. This cash item of \$3,200, that is money of the bank that was taken and credited to Stewart?

A. That is what we are undertaking to show, your Honor.

Q. What do you mean to say, \$3,200 went out on March 11th?

A. Went in, went into the cash items, your Honor. Let me use an ordinary term for that. On March 11th a cash item originated and was carried in Stewart's cage-book in the sum of \$3,200.

Mr. GRINSTEAD.—Now, to explain that, that means he carried it in his book, as if he had something there that he called cash? A. Exactly.

Q. And he kept calling that \$3,200 cash until the

(Testimony of T. H. Adams.)

20th of the month, and on the 20th of the month he sold the bank [194] the two notes of Phillips, and eliminated the cash item,—ceased to hold it as cash. In other words, the bank now owned notes instead of cash. A. Instead of cash?

Q. Instead of the cash item. A. Yes.

(By Mr. MILLER.)

Q. When these two notes were sold to the bank, Stewart took credit for the amount of them?

A. No.

Mr. GRINSTEAD.—Cash item took credit.

Mr. ADAMS.—Cash item was credited. That is what we want to do, to go back and show the origin of the cash item.

Q. To show Stewart got the money? A. Yes.

Mr. GRINSTEAD.—Cash items, got the benefit of the money.

The COURT.—When the notes came in, the cash item,— A. Disappeared.

Mr. GRINSTEAD.—In other words, the legal effect was that the bank traded the cash item for the two Phillips notes?

Mr. MILLER.—It becomes important to show the relationship of the cash item to Stewart.

Mr. GRINSTEAD.—I have not been apprised by the pleadings that I have to go into the guardianship of Henry Deering in this case.

The COURT.—I will overrule the objection.

Mr. GRINSTEAD.—Note an exception.

The COURT.—Exception allowed.

Mr. ADAMS.—On March 11, 1918, reading from

(Testimony of T. H. Adams.)

Stewart's cage-book, as I have already testified, the cash item originated [195] of \$3,200 and which appears on the right-hand page; and on the opposite or, left-hand page there appears a credit, individual deposit, of F. L. Stewart, \$200.

Mr. GRINSTEAD.—Let's explain that right there. That means, when the bank took in whatever that cash item was, Mr. Stewart took \$200 of it into his individual deposit?

Mr. ADAMS.—Just so.

Q. Now, what became of the other \$3,000?

Mr. ADAMS.—The other \$3,000, the cage-book shows, was credited to savings account.

Q. And the deposit slip shows that as going to the guardianship of Henry Deering?

A. The deposit slip we are unable to find, but the ledger shows, F. L. Stewart, to guardian Henry Deering, for March 11, 1918, shows this guardianship account credited with \$3,000. Now, going back on that, we are able to trace this, if the attorneys and Court wish,—

Mr. MILLER.—Go on and read it.

The COURT.—Is that claim against the bonding company for \$2,000 or \$3,000?

Mr. ADAMS.—No, your Honor, Mr. Stewart put his check in on the day that the cash item disappeared, for \$200.

The COURT.—That is proving up a claim of \$200?

Mr. ADAMS.—Not of \$200, but of \$3,000. The

(Testimony of T. H. Adams.)

\$200 is a legitimate transaction, it appears, except he borrowed that for a short time.

Mr. MILLER.—There are two notes each, of \$1,500.

Mr. ADAMS.—Among the deposit tickets of August 14th, 1915, I find this one: To the credit of F. L. Stewart,—the name is so badly punched I cannot read it all,— [196]

Henry Note		\$3,879.50
Less Note	\$2,000.00	
Interest	7.56	
	<hr/>	
	\$2,007.56	2,007.56
		<hr/>
		\$1,871.94
Less Revenue		1.78
Net		\$1,870.16

That is in Mr. Plamondon's handwriting.

Q. Go on with your tracing?

A. On January 28, 1915, among the deposit slips of January 28, 1915, is the following:

To the credit of F. L. Stewart, J. J. Henry Note, \$2,000. F. L. Stewart, Cashier.

That is in Mr. Stewart's handwriting.

Now, turning to the note register of that date, Jan. 28th, 1915, Page 14, Vol. "D," we find a note of J. J. Henry, endorsed by F. L. Stewart, \$2,000; marked "Paid," August 14, 1915, which is the date that the other note of \$3,879.50 came in with a credit of \$2,007.56, principal and interest of old note.

(Testimony of T. H. Adams.)

Turning to the note register, page 25, Vol. "D," Aug. 14, J. J. Henry note, endorsed by F. L. Stewart, \$3,879.50 marked "Paid" August 14, 1915.

The COURT.—That is a note dated August 14, 1915?

A. Yes, that is the date that this note is marked "Paid" in the register.

Q. Now, go on with your explanation in reference to that?

A. Reading from Plamondon's cage-book, August 17, 1915, under Notes Paid, we find, without comment, \$3,879.50. Debits to corresponding banks, Frisco, \$3,879.50, balancing this item. [197]

Q. What do you mean while you were there, by that deposit to the San Francisco bank?

A. It means that the note was taken out of the notes of the Kelso State Bank and so far as the books show sold to the American National Bank of San Francisco.

On the date of August 17, 1915, General Ledger 6, of the Kelso State Bank shows American National Bank charged or debited with \$3,879.50.

Q. That is General Ledger 6, page 73?

A. Yes. Turning to page 104 of the same volume, General Ledger, rather, pages 104 and 105, American National Bank on the 19th day of November, 1915, is credited with \$3,879.50.

Q. Does that mean that the note came back to the Kelso Bank?

(Testimony of T. H. Adams.)

A. Came back to the Kelso Bank and went into the work on that day.

Q. What is that last date?

A. That is November 19, 1915.

Q. That is when that note came back in the Kelso Bank, isn't it?

A. When the note came back to the Kelso Bank, and the American National Bank,—

Q. Was credited?

A. Given credit for it. On that date, November 11, 1915, the guardianship account of F. L. Stewart of guardian of Henry Deering, incompetent, is charged with \$3,879.50. The note, so far as the records are concerned, disappears there and no further trace of it is found, and no further reference of any kind appears so far as I have been able to tell, until the date of this credit to the Deering estate of \$3,000, and the account shows that the Deering estate has [198] never been reimbursed from that day forward, except some small deposits of \$200 and \$100.

Q. How long was that credit of \$3,000 given to the Deering estate, before the account was closed?

A. About one month.

Q. About one month?

A. The time was twenty-nine days, to be exact.

Q. When you speak of the \$3,000, was that the cash item you have referred to?

A. That is the \$3,000,—

The COURT.—Twenty-nine days before the bank closed?

(Testimony of T. H. Adams.)

WITNESS.—No, twenty-nine days before the Deering estate,—I do not know about the Deering estate, but before Stewart's account with his guardian was closed in the bank.

Q. And that is the only credit that the estate got so far as you know, was that \$3,000?

Mr. GRINSTEAD.—I cannot see why you are going into the Deering estate.

Mr. MILLER.—In order to show that Stewart took this money and put it into the Deering estate, of which he was the guardian.

Mr. GRINSTEAD.—If he did, and if the bank got full value, I do not see the materiality of it. Your own testimony shows that it got full value.

Mr. MILLER.—It did not get full value. It got the two Phillips notes.

Mr. GRINSTEAD.—Then the only question is the value of the Phillips notes.

Mr. MILLER.—Those notes were put in there by Mr. Stewart. These two Phillips notes were Stewart's notes, which he put [199] in the bank and drew the money out and paid it in this Deering estate that he was the guardian for. The Phillips notes, we will attempt to show, were bogus notes.

Mr. GRINSTEAD.—What do you mean by bogus notes?

Mr. MILLER.—Oh, had no value,—one of Stewart's manipulations. That is all of the direct examination at this time. [200]

(Testimony of T. H. Adams.)

Cross-examination.

(By Mr. GRINSTEAD.)

Q. Mr. Adams, before we leave this \$3,879.50 that you have been testifying to, the only thing in your register, or in your records that connects up the note that came back from San Francisco, with any note that had been previously sold, is the fact that the amount is the same,—there is nothing in the record that identifies it.

A. Yes, the correspondence does.

Mr. MILLER.—It has not been introduced in evidence. You can have it though, if you want to.

Q. This file of correspondence is the same thing you had in your files and counsel just handed it to me, that is correct isn't it?

A. That is correct.

Mr. GRINSTEAD.—May that be marked for identification?

Mr. MILLER.—No objection, no objection to it being marked or admitted in evidence.

The COURT.—Let it be marked for identification, 3-A.

Q. Now, just passing that matter for a few minutes, the entries that are made of these various transactions, in the books and records of the Kelso State Bank in the handwriting of F. L. Stewart are all plainly identified and easy to trace, are they not; there is no attempted concealment where he takes what you claim is a dishonest credit,—he has written it out on the books what it is for?

(Testimony of T. H. Adams.)

A. Generally that is so. There may be an exception or two.

Q. None of it occurs in those that you have been offering here, he wrote it out, what it was all about, in each case? [201]

A. Except those cash items. They are sometimes labelled and they are sometimes not,—simply carried into the account. I believe that is the only exception I would want to make.

Q. His records are much more easily traced than Mr. Plamondon's records of the same sort?

A. Very much more. Mr. Plamondon was a general teller or chief teller, and had to condense his record more than Mr. Stewart did.

Q. There is not any evidence in any of Mr. Stewart's work of any effort of a concealment at all of the various transactions that we have been going over?

A. None in these as I recall now, at all.

Q. Now, another thing, at the time you took charge of the bank as you testified, you found large quantities of Mr. Stewart's checks, going back for a number of years, they were in the file and remained there, and you have brought them here, have you not?

A. They were not exactly in the file.

Q. They were in the bank premises?

A. They were in the building.

Q. What I want to ask you about now is, what about his correspondence and the bank correspondence, was that all there in the bank?

(Testimony of T. H. Adams.)

A. There was various voluminous correspondence in the bank. I would not be able to say it was all there.

Q. That correspondence is here, you have brought it up?

A. I have brought all I could find that related to the questions at issue.

Q. Have you brought up all the correspondence in reference to Wallace & Mosier and the Northwest Transportation Company [202] that you could find in the bank,—you have that here?

A. I had only a very limited time to get that out, and I employed two young women to get it out for me.

Q. I will ask you whether or not it is here?

A. Well, it is here, with the understanding that they might have missed something, but under my directions they were to have everything that pertained to it.

Q. So far as you know, all of these matters that we are being sued on here, in the matter, no complaint was ever made of those transactions by the bank or its officers or directors, was there?

A. That would only be hearsay.

Q. I do not understand the question.

A. That would only be hearsay, I could not answer that.

Q. You did not find in the records of the bank any notice to the surety company of irregularity in any of these transactions? A. None.

Q. So far as you know, there never was any

(Testimony of T. H. Adams.)

claim made or any notice given to the surety company of any kind at all until the one you gave that is in evidence here?

A. The commissioner,—I have seen a copy of the notice that the commissioner gave, that there would probably be a claim.

Mr. MILLER.—He is speaking of before you took charge of it.

A. That was before I took charge.

The COURT.—That was before you took charge?

A. It was before I took charge. The commissioner of banking closed the bank on the 17th of March and I took charge on the 27th of April following; and I have a copy of the [203] letter addressed by Mr. Claude P. Hay to the bonding company, setting forth that there would probably be a claim.

Q. That was after the bank closed? A. Yes.

Q. That was some time after the 17th of March, 1921?

A. Between the 17th of March and the time I took charge.

Q. You have given all of your time since you went in there to the handling of these bank matters, haven't you? A. Yes.

Q. During that time you have been over the records and files of the bank quite completely?

A. Some of them I have gone over a very great many times, and perhaps a good many of them I have never even seen.

Q. You have not found anything indicating any

(Testimony of T. H. Adams.)

notice or any claim, under this bond that we are being sued on here? A. No, none.

Q. Now, as to these various loans or notes that went into the bank that you are claiming here are chargeable against the bond, did you find any record in the bank where the bank, or its officers, or its directors had ever repudiated or otherwise questioned those loans?

A. There is no record that I know of; no, sir.

Q. For instance, just for illustration, not to cross-examine on the particular matter, but he had just been offering these Phillips notes of \$1,500, notes that went into the bank really as a cash item, there never was any question raised by the bank as to those Phillips notes? A. No. [204]

Q. Mr. Stewart was not asked to take them out of the bank?

A. There is no record I have found of any such request.

Q. They remained in the bank and in the banking books there until the commissioner took charge, as a part of the estate of the bank, and not questioned,—isn't that the fact?

A. As far as the record discloses, that is true.

Q. And that is also true as to all of the other items that are sued on here, isn't it? A. Yes.

Q. So that from the time that each and all of the items sued on came into the bank, at their several dates, until the Bank Commissioner took charge, those notes or renewals of them stayed in the bank as assets, and were not questioned by the bank

(Testimony of T. H. Adams.)

as to the bank's ownership of them as far as you have been able to find from the records?

A. With the exception of the notes that were occasionally discounted and then taken out,—

Q. Yes, except for the ordinary commercial transactions, when the bank would sell them and maybe take them back later?

A. That is the only time I find any record of their having been out of the bank.

Q. The bank acted as to them, and all of these loans, on the basis of owning the paper?

A. Yes.

Q. At all times? A. Yes.

Q. Now, another question, on a great many of these transactions that you have sued on here, the bank subsequently [205] made loans to the same parties, did they not? A. They did.

Q. Out of which Stewart took no credit at all?

A. That, I think, is sometimes true.

Q. In other words, there was a continuous course of dealing with Wallace & Mosier and with the Northwest Transportation Company and the Triumph Machinery Company and the Seaside Packing Company, and these other items that you sue on, some subsequent and some prior to other loans.

A. Prior to other loans and renewals at any rate.

Q. Well, in some cases, there were additional credits extended? A. Yes.

Q. And after these loans that you have sued us on here, the bank at all times subsequent to the

(Testimony of T. H. Adams.)

time those papers came in to and became the property of the bank, as you state, they took renewals of them,—that has been the testimony here, the bank took partial payment on them when they could get them, did they not, and also took interest payments on them?

A. They took interest payments.

Q. When it could get them?

A. It might have had an opportunity sometimes to get money that the record does not show.

Q. As far as you know they took all that they could get?

A. As far as I know, they took all that they could get.

Q. At all times acted as the owners of the paper and were entitled to take payment on it if they could get it?

A. So far as the record discloses.

Q. Another thing, you have propounded,—

The COURT.—I understand that to apply to the questioned [206] transactions.

Q. That is true of all of these questioned transactions, isn't it,—that is the point of the question?

A. I lost the connection.

Q. I will ask a question that covers it all, if I might. Mr. Adams, as to the notes we are sued on herein, or the notes of which these notes are renewals, the bank at all times accepted payments on those notes whenever they could get it, as far as the record discloses?

A. So far as the record discloses, yes.

(Testimony of T. H. Adams.)

Q. And accepted interest whenever it could get it?

A. That is correct.

Q. And accepted security whenever it could get it?

A. Yes,—you are asking whenever it could get it. It did accept all of these notes, and I assume they did whenever they could get it.

Q. The Court's question was whether your testimony here that the bank accepted payment of interest and so on applied to these loans that are in controversy here, and your answer is "Yes" isn't it?

A. It might and not; to some extent it did not. In some instances it did, and some perhaps not. There may be some of that interest that did not fall due on some of them, but I will answer, if I might, in this way, that they were treated just as any other notes apparently, in the bank.

Q. That is what I thought? A. Yes.

Q. Now, taking up another subject, you have offered in [207] evidence here, as a part of your claim, different matters of loans, for instance, the loans to Stewart, and for instance, the Kelso Farm Loans, using that as an illustration.

A. Yes, I understand.

Q. I understand your contention to be that that loan to the Kelso Farm Company is practically a loan to Stewart? A. That is our contention.

Q. That is not the only loan that the bank ever made to Stewart?

A. Stewart had a very great many loans from the bank at one time or another.

(Testimony of T. H. Adams.)

Q. Let me ask you this, to save time, isn't it a fact that at all times during the time he was connected with the bank, down to the very last, he used to borrow money and nearly always had some notes in the bank?

A. I would not want, without referring to the record, to make it that sweeping, but I will say from memory, that a great deal of the time he owed the bank. I would not want to say all the time, or practically all the time, as counsel has put the question, without referring to the record; that might be so and might not be so, but I find that there were a great many loans to Stewart.

Q. Did you find as to those loans to Stewart, that they were always approved and authorized by the directors prior to the time they were made and the notes were accepted by the bank?

A. There is no evidence that any of them were ever approved before the loans were made.

Q. In other words, throughout the entire period of his connection [208] with the bank, the loans were made to Stewart without authorization from the directors?

A. So far as the records disclose, the directors never authorized any loans to F. L. Stewart.

Q. That status is not confined to Mr. Stewart alone, is it,—the other officers and directors of the bank borrowed money without the approval or authorization of the trustees,—that is not limited to Stewart? A. No, it is not limited at all.

Q. Mr. George F. Plamondon was borrowing in

(Testimony of T. H. Adams.)

the same manner during the time of his connection with the bank?

A. Yes. I would not make it quite so sweeping as that, however.

Q. Mr. Pat Baxter was borrowing repeatedly without authorization.

A. I hardly think that was true.

Q. Mr. Baxter was a trustee of the bank all the time?

A. No, he was director only for a few years.

Q. A few years?

A. Well, perhaps three or four or five years.

Q. Wasn't he, during the last years of the bank,—

A. I will explain,—

Q. I will pass that for the present?

A. I will answer your question as to Baxter's relation. I do not know whether he did or did not. I have never found any reference to any loans to Baxter.

Q. There were plenty of loans to Baxter on the books, it is only a question whether it covered the date he was trustee or later on?

A. I believe I could dispose of that by saying that there is [209] no record in the bank of any loans having been authorized.

Q. To directors?

A. To directors, or anybody else.

The COURT.—Let me get that. The directors did not pass on the loans? A. No.

Q. In advance?

A. Never in advance. There is one record of a loan being ratified after it was made.

(Testimony of T. H. Adams.)

Q. But none authorized in advance? A. No.

Q. It is also true that Mr. Ayers and Mr. Catlin and Mr. Wallace borrowed money from the bank on notes, isn't it?

A. I have a record where Mr. Ayers borrowed, but I do not believe I have seen in the record where the other gentlemen borrowed directly. The Wallace Land Company, a corporation, borrowed some, I know.

Q. Let me ask you if Lew Plamondon,—not George Plamondon, was not assistant cashier of the bank in 1914?

A. He was at one time, an employee of the bank, but I do not know that I remember his capacity.

Q. George Plamondon really took his place later, when he went down to the Woodland bank?

A. Well, I do not know. Louis Plamondon was employed by the bank about that time, but whether he was assistant cashier I do not believe I have seen.

Q. Now, Mr. Adams, Mr. Wallace was a director from the beginning of the bank, was he not?

A. No.

Q. When did he start in? [210]

A. I would have to consult the record. He has been director for quite a long while.

Q. I might pass that up now, if you do not know at this time. Mr. Catlin was a director for a long time? A. Well, for some time.

Q. He borrowed money from the bank?

(Testimony of T. H. Adams.)

A. I could not answer as to that. I have never seen anything in the record in regard to that.

Q. Mr. Ayers, you say, borrowed money?

A. I have seen a reference to Mr. Ayers.

Q. He was a director? A. Yes, a director.

Q. You do not know whether he borrowed while he was a director or not?

A. No, I could not testify to that without consulting the record.

Q. All of the loans that were made to the directors and officers of the bank, according to your understanding of the records, were made as a matter of practice and custom there, without authorization of the board?

A. I can testify to that so far as the record discloses, the board never authorized anything.

Q. Now, Mr. Adams, the bank-books do disclose that the bank had in force and effect an auditing committee at all times did they not?

A. I do not believe I have seen any reference to an auditing committee.

Q. You have read the minutes of the bank?

A. I do not know as I have. I do not know I have ever read them through one after another. Some matters I have read [211] a number of times.

Q. You identified the minutes here the other day of the two bundles, the book and the bundle that constitute the minutes. A. Yes.

Q. Of course, these are only preliminary questions, but the minutes show at the annual meeting

(Testimony of T. H. Adams.)

there was an appointment of an auditing committee each year. I think each year, I have not examined it closely. What I was going to ask you was whether or not the records show, so far as you know, anywhere, that the auditing committee had ever criticized or otherwise questioned the various loans that are in controversy here?

A. No, I have not seen anything to that effect.

The COURT.—Do I understand the witness admits there was an auditing committee?

WITNESS.—I have not seen any reference to that, your Honor. I am not disputing it. I simply do not know.

Q. Mr. Adams, Mr. Stewart had a great many transactions with the bank that are not directly involved in this litigation, did he not? A. Yes.

Q. There are a large number of checks from him passing to the bank and charged to his account, that is, the ledger account in the bank, are there not?

A. I have never read the checks. I have read copies that you made, or your stenographer made, and that shows a great number of checks made payable to the bank.

Q. You have never checked those out to see what they were for? [212] A. No.

Q. Now, as I understood you the other day, when I was asking you a few questions, these claims here in this case are propounded wherever you found somebody's check going into the bank and Stewart getting credit for it, without regard to an ex-

(Testimony of T. H. Adams.)

amination as to whether he paid for that credit, for the party,—that is correct?

A. No, that is not correct. We are evidently mistaken in some of these, but it was not our intention to include any claim of any kind that we did not trace into the unpaid notes of some character which we have on hand.

Q. I am not speaking about the notes where you have erroneously charged us with things that have been paid, but in fixing the liability on Mr. Stewart and on us, you merely took the credit that went to Mr. Stewart's account without checking up to see whether he had paid the party who signed the note,—I think you testified to that the other day?

A. Without seeing whether he had paid the party?

Q. Yes.

A. We tried to get an understanding of that. If I may answer in this way, if you mean to ask that I have made an investigation to see whether the party who gave the note received payment in full from Mr. Stewart for it, I will answer I have not. I mean, I did not do that for the purpose of that claim.

Q. Now, just for an illustration, the first claim that you offered in evidence, or offered any evidence on is the Wallis & Mosier note of October 4, 1915. You found there that Wallace & Mosier had signed a note which was made to the bank, had gone into

(Testimony of T. H. Adams.)

the bank and Stewart had taken the [213] credit for it, for \$420? A. Yes.

Q. And because of that fact, you charged him with appropriating \$420, is that correct?

A. Partially so, at least.

Q. Just in what way is it not entirely so?

A. We at least thought in our efforts to trace these notes that the renewal, or that note, through its renewed forms, was still in the bank.

Q. I understand that you also had further thought that the note was still unpaid? A. Yes.

Q. But I am getting to the question of the dishonesty on which you sue here. You assume that if he got the credit for that note, he was dishonest, do you not? A. Well,—

Q. You are not suing us merely to make us pay the note, are you? A. No.

Q. You are suing us because you assume that the \$420 was dishonestly taken by Mr. Stewart?

A. I assume that it was taken in violation of the law. [214]

October 31, 1922, ten o'clock A. M.

Trial continued as follows:

Mr. GRINSTED.—When we closed last evening, I had introduced our Exhibit 6-A, which is a lot of letters, explaining the transaction pertaining to the \$1,972.75, and also pertaining in particular to the transactions,—so that we may be clearly in the record, there were one or two exhibits identified by the witness earlier in this

(Testimony of W. F. Magill.)

case. I want it made clear that I offered all of the exhibits identified up to this time.

CLERK.—Exhibit 3-A, copy of letter to the Kelso bank.

Mr. GRINSTEAD.—The minute-books and these exhibits so far as identified by the witness, the checks and letters are offered and considered as admitted.

The COURT.—They will be admitted.

Thereupon the old minute-book and file of minutes and copy of letter Kelso Bank to Am. Nat'l Bank were marked Defendant's Exhibits 1-A, 2-A and 3-A.

Mr. MILLER.—I have two or three witnesses that came here from the Southern part of Washington, and are anxious to get away, and Mr. Grinstead agrees that I may call them before we go on with the cross-examination of the preceding witness. [215]

Testimony of W. F. Magill, for Plaintiff.

W. F. MAGILL, a witness called by the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Your name is W. F. Magill? A. Yes.

Q. You live at Portland? A. Yes.

Q. You formerly lived in Cowlitz County?

A. Yes.

Q. You were acquainted with Mr. F. L. Stewart?

A. I was.

(Testimony of W. F. Magill.)

Q. The former cashier of the Kelso bank?

A. Yes.

Q. How long have you known him?

A. Why I have known Mr. Stewart ever since he came to Kelso, I suppose twenty or twenty-five years?

Q. You lived at Kalama for a number of years?

A. I lived at Kalama for a number of years in the same County.

Q. Did you have any dealings with Mr. Stewart or in which Mr. Stewart was connected during the years 1920 and 1921? A. Yes, sir.

Q. Did you have any dealings with Mr. Stewart in connection with the Independent Navigation Company? A. Yes, sir.

Q. Was that a corporation? A. Yes, sir.

Q. Organized under what state? [216].

A. Under the laws of Oregon.

Q. Do you know what interest Mr. Stewart had in that corporation?

Mr. GRINSTED.—We would object to that as immaterial. There is no question on that, there is no claim made that the failure of this bank is connected with this company in any way.

Mr. MILLER.—It grows out of the companies being merged.

The COURT.—I take it it is only preliminary. The objection will be overruled.

Q. It is merged in the Northwest Transportation Company.

(Testimony of W. F. Magill.)

Mr. GRINSTEAD.—I think that is not the best evidence.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Note an exception, please.

The COURT.—Exception allowed.

Q. You may answer. A. Yes.

Q. What was his interest in it?

Mr. GRINSTEAD.—This is objected to as coming under the objection and exception just made.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception.

A. Mr. Stewart acquired 'all of the stock in the Independent Corporation, in the Independent Navigation Company.

Q. Was that done through you?

A. Some of it was through me, the larger part of it, I think; the rest of it he wrote to me about.

Q. Anyway he acquired the stock in that company? A. Yes.

Q. And then what became of the company? [217]

Mr. GRINSTEAD.—My objection is going to all of this, as far as I can anticipate the witness' answer, it must be to the purport of some reorganization which is evidently evidenced by documents, rather than a course of dealing.

Mr. MILLER.—We have the documents here.

The COURT.—If this is merely preliminary,—

Mr. GRINSTEAD.—If it is merely preliminary, there is our general objection.

The WITNESS.—What is the question?

Q. What became of that corporation?

(Testimony of W. F. Magill.)

A. It was dissolved, the Independent Navigation Company.

Q. Was that done through you?

A. Yes, I prepared the papers.

Q. You have the records showing the dissolution of that corporation? A. Yes.

Mr. MILLER.—Unless you want them, I will not bother to put them in, because it is only preliminary to what follows.

Q. Do you know anything about the Northwest Transportation Company? A. Yes, sir.

Q. Is that a corporation?

A. That is an Oregon corporation.

Q. That is a company that a lot of these notes involved in this case were signed by. You say that is an Oregon corporation? A. Yes.

Q. And did you organize that corporation?

A. No, I did not.

Q. Do you have the minutes of that corporation? [218] A. I have.

Q. What was Stewart's connection with that corporation?

A. Mr. Stewart owned the stock of the corporation when I first came in touch with it.

Q. Did you have a conversation with Mr. Stewart relative to that stock and what became of it?

A. Yes.

Q. Did he come into your office with the stock?

A. Yes, Mr. Stewart came in.

Q. Into your office?

A. Into my office with all of the stock of the

(Testimony of W. F. Magill.)

Northwest Transportation Company, which had been issued to C. M. Kellogg, and two other persons.

Mr. GRINSTEAD.—I understand that the question of counsel to be only asking for conversations had by this witness with Mr. Stewart?

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—May I ask Mr. Magill a question?

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—You were not interested in any manner in this Northwest Transportation Company?

Mr. MAGILL.—Nothing except a nominal director.

Q. You were a director and stockholder of the company?

A. Yes, a director and stockholder of the company.

Mr. GRINSTEAD.—Now, if it please the Court, I will object to this witness testifying as to conversations had with Mr. Stewart, on the ground that Mr. Stewart, being deceased, under the statutes of the State of Washington, such conversation would be incompetent, violative of our statute as against Mr. Stewart, and therefore violating [219] our statute as against a surety for Mr. Stewart, which surety, in a judgment against it, is entitled to have the same rights conferred upon it as the estate of Mr. Stewart, and this evidence would be clearly incompetent as against the estate.

(Testimony of W. F. Magill.)

The COURT.—The purpose of this testimony is to show his connection with this company.

Mr. MILLER.—That is all, not for the purpose of showing title to property or anything of the kind.

Q. You said this conversation you are talking about was to the effect that he had the stock?

A. Of the Northwest Transportation Company.

Q. You mean he had the certificates in his hands?

A. He had the certificates in his hands, brought them to my office.

Q. And the certificates were in what shape?

A. They were assigned; that is they were assigned to the parties they were originally issued to.

Q. Well, you examined them?

A. I saw them there, and I followed his directions and divided them up again, reissued the stock.

The COURT.—When he tells about who he re-issued the stock to, that is not a statement. If he reissued the stock certificates and delivered them, that is not a statement of the conversation. He might tell that much at any rate.

Mr. MILLER.—We have a letter here from Mr. Stewart stating where his stock was held, so that will do away with that objection.

Q. I will ask the witness another question: Did Mr. Stewart own any stock in that company, and who held the stock? [220]

A. The stock in that company was held by C. M. Kellogg, 240 shares, and two other parties. I could tell you if you handed me the book, a small amount.

Q. Originally what became of the stock?

(Testimony of W. F. Magill.)

A. You mean the stock that was originally issued to this company?

Q. No, what was reissued at the time you reissued it?

Mr. GRINSTEAD.—I object to that as not the best evidence, incompetent, irrelevant and immaterial, and as to any conversation, we object on the ground already stated.

The COURT.—I overrule the objection on the first ground and defer the ruling on the second ground until you find the State statute bearing on that.

Q. What I am coming to, was any stock issued to Stewart? A. No, sir.

Q. Who held that stock for Stewart?

A. You mean originally?

Q. No, at the time of this rearrangement.

Mr. GRINSTEAD.—If the Court please, I object.

The COURT.—As to who held it for Stewart, I sustain the objection. He can say who held it, but the proposition as to whether it is for Stewart or not, is something else.

Mr. MILLER.—Mr. Magill had that stock himself and held it for Stewart.

The COURT.—This witness?

Mr. MILLER.—Yes.

The WITNESS.—You said originally?

Q. I mean when he brought the stock in and had it divided up at that time.

The COURT.—He can tell,— [221]

Q. I will ask you another question: How many

(Testimony of W. F. Magill.)

shares of stock did Stewart have in the Northwest Transportation Company?

Mr. GRINSTEAD.—If the Court please, just a moment, as I understand from what has been stated, apparently he held none of it in his own name, and so going to that point, it is a conclusion of this witness as to what he held in his own name.

Q. I will show you this letter, whose letter is that? A. This is Mr. Stewart's letter.

Q. To whom? A. To me.

Q. Is that Stewart's handwriting? A. It is.

Mr. GRINSTEAD.—Well, if you want to identify it and offer it in evidence, I will make an objection at that time.

Mr. MILLER.—I will have it identified first as an identification.

Thereupon said letter was marked as Plaintiff's Identification 10.

The COURT.—(After reading Identification 10.) Where is the intimation as to what company he is talking about?

Mr. MILLER.—I will prove that by this witness.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—We are making the same objection as heretofore.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception.

The COURT.—Exception allowed.

Thereupon said letter was received in evidence and marked as Plaintiff's Exhibit 10. [222]

(Testimony of W. F. Magill.)

Q. In this letter it says: "you hold all of my stock in your name." What company did that refer to?

A. Northwest Transportation Company.

Q. Northwest Transportation Company?

A. Yes.

Q. That is true, you held all of his stock in that company? A. Yes, I had it all.

Q. I hand you a book, what is this book you have in your hand?

A. This is a minute-book of the Northwest Transportation Company.

Q. Has that been in your possession?

A. It has been in my possession most of the time since prior to March 10, 1920. Part of the time it has not been in my possession, because I was not secretary of the company, but it has been in my possession for a good many months now, I do not know how long.

Mr. GRINSTEAD.—May I ask this witness another question here?

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—You were Stewart's attorney?

Mr. MAGILL.—I was for a lot of his matters in Portland, yes.

Mr. GRINSTEAD.—I think these communications are in the nature of confidential communications, to which Mr. Stewart has a right to claim privilege, and we claim the same privilege being relegated to his liabilities to the extent of this suit.

(Testimony of W. F. Magill.)

Mr. MILLER.—You could not claim the privilege for him. These are the minutes of a corporation meeting that we are now trying to show.

The COURT.—Just what is the matter now?

Mr. MILLER.—I was trying to show the corporation minutes. [223] This book has been identified and I will have it marked as the corporate books of this company.

Mr. GRINSTEAD.—I think all of this witness' testimony should be stricken as irrelevant, incompetent and immaterial, and on the further ground of privilege, which by subrogation comes to us.

The COURT.—Objection overruled. Motion denied.

Mr. GRINSTEAD.—Allow us an exception, please.

The COURT.—Allowed.

Q. Will you turn to that again, I want to call your attention to the minutes of March 10, 1920.

Mr. MILLER.—This is for the purpose of showing that this man Shepherd, whose notes are involved here, was president of this same company.

Mr. GRINSTEAD.—That is what you are seeking to prove by this witness?

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—We will concede that Frank Shepherd was president of the Northwest Transportation Company. We admit that, there is no argument about that.

Mr. MILLER.—And will you concede that he and Stewart were the only stockholders of the company?

(Testimony of W. F. Magill.)

Mr. GRINSTEAD.—Just a moment, there is the same question of privilege and not the best evidence.

Mr. MILLER.—I have the stock here that was issued to Shepherd, if you want it.

Mr. GRINSTEAD.—I do not care about it, you can offer the stock to Shepherd, if you wish to.

Q. Stewart's stock was never issued, was it?

A. No. [224]

Mr. GRINSTEAD.—Now, there, if the Court please, we offer the further objection that the Court has ruled right on the point involved there.

Q. Stewart's stock was not issued?

A. Not to him, no, sir.

Q. Who were the stockholders of that corporation after it started?

Mr. GRINSTEAD.—That is objected to as not the best evidence. The records of the company is the best evidence.

The COURT.—Objection sustained.

Q. Well, can you tell from the books and from this certificate?

A. At what time are you referring to?

Q. After that stock was divided up there by you at Stewart's suggestion, from then on.

A. Here are the original stubs of the stock as it was divided up at that time.

Q. What date was that? A. March 10, 1920.

Q. What date was that?

A. That is the date of this meeting.

Mr. MILLER.—The Court will notice that is

(Testimony of W. F. Magill.)

prior to the making of all the Shepherd and North-west notes.

The WITNESS.—I made these transfers myself for Stewart, at his suggestion, and divided it up.

Mr. GRINSTEAD.—I move that be stricken as a communication from Mr. Stewart to his attorney.

The COURT.—Objection sustained.

Q. Now, from this record, who is the owner of the stock from March 20? A. Mr. Shepherd,—[225]

Mr. GRINSTEAD.—I object to that as not the best evidence.

WITNESS.—Mr. Shepherd, 125 shares.

Mr. GRINSTEAD.—The best evidence of that is the stock certificates.

Mr. MILLER.—He is reading from the paper.

Mr. GRINSTEAD.—Let him put the paper in, then it is the best evidence.

Mr. MILLER.—I will introduce that as evidence in this case.

The COURT.—Admitted.

Thereupon said paper was received in evidence and marked as Plaintiff's Exhibit 12, being a Stock Certificate Stub-Book.

Q. This exhibit 12 is a stub-book, a stub and one certificate, the one you issued to Shepherd, showing the stockholders of that corporation from this date on? A. Yes

Mr. GRINSTEAD.—I beg your pardon, it does not show anything of the sort. It shows it on that date, but it does not show what occurred after that date.

(Testimony of W. F. Magill.)

Mr. MILLER.—All right.

Mr. GRINSTEAD.—Do you withdraw that question?

Mr. MILLER.—I will.

Q. This shows as of that date? A. Yes, sir.

Q. Was there any changes made thereafter within your knowledge?

Mr. GRINSTEAD.—That is objected to again as not the best evidence.

The COURT.—That is within his knowledge.

Q. Is there any recorded change from that time on of that [226] stock.

The COURT.—I overrule this objection. It is the only way to show a negative.

Mr. GRINSTEAD.—The records are the best evidence of whether there are any changes in the records.

Mr. MILLER.—If there is nothing in the record there, how are we going to produce it?

Mr. GRINSTEAD.—The law requires that a list of all stockholders be kept in the books of the company. Where is the record showing that?

The COURT.—Has the book been offered in evidence?

Mr. GRINSTEAD.—It has not been offered in evidence.

WITNESS.—So far as I know, this is all the stock record they have. Mr. Stewart brought the blank shares of stock into my office and had it attended to there. He didn't even have a book. So far as I know, that is all there is to it.

(Testimony of W. F. Magill.)

Q. You know this Fritz Kruse, that is mentioned as one of the directors of this corporation?

A. Yes, sir.

Q. Do you know where he is?

A. He is in Portland working on a boat.

Q. You do not know whether he is the same one that gave this note that is involved in this suit or not?

A. I do not know what note is involved.

Q. Do you know who had the active management, looking after the business and the finances, the active management of this corporation?

A. Northwest Transportation Company?

Q. Yes. It is mentioned here that Fritz Kruse was a [227] director of this corporation?

A. Yes.

Q. Was he elected one of the directors of this corporation? A. He was.

Q. And you and who? A. Shepherd.

Q. You and Shepherd? A. Yes.

Q. Shepherd was the president of the corporation? A. Yes.

Q. Did you say who was the active manager of this corporation?

Mr. DAVIS.—I object to that. The laws provide that the trustees shall manage the corporation. He has testified who the trustees were.

The COURT.—Objection is overruled.

WITNESS.—So far as I know, Mr. Stewart managed the whole thing. Later on, afterwards, after this meeting, I do not know what transpired.

(Testimony of W. F. Magill.)

Q. I hand you a letter here, is that the letter which you received from Stewart?

A. Yes, this is the letter I received from Stewart.

Q. Seems to be a copy attached there?

A. It came with the letter, it is referred to in the letter.

Mr. MILLER.—I will offer that book showing the incorporation and the corporate minutes of this corporation, as pertaining to this case. I do not think I will say any particular part of the book.

Mr. GRINSTEAD.—I haven't asked that it be introduced, but I simply object to it going in as incompetent, irrelevant and immaterial. [228]

Mr. MILLER.—I have had it marked, I think I will offer it in evidence.

Mr. GRINSTEAD.—We renew our objection.

Mr. MILLER.—Then I will not,—

Mr. GRINSTEAD.—You withdraw it then?

Mr. MILLER.—No, I think I will let it go.

The COURT.—It may be admitted, objection overruled.

Mr. GRINSTEAD.—Exception.

The COURT.—Allowed.

Mr. GRINSTEAD.—You haven't offered this letter.

Mr. MILLER.—I was going to offer it. I handed it to you to read. I would like to offer this letter with the copy that it is attached to, which Mr. Magill said came with it. It is a letter from Stewart to Magill.

(Testimony of W. F. Magill.)

Mr. GRINSTEAD.—All of this testimony, including this letter, is going in evidence over all the various objections we have urged, and which the Court has practically overruled. This letter, I will call your Honor's attention, is a communication, under the witness' own testimony about things growing out of their relation apparently, of attorney and client.

The COURT.—That objection will be overruled, and it will be admitted.

Said letter was thereupon received in evidence and marked as Plaintiff's Exhibit 13.

Q. I will hand you another letter, that is the letter which you received from Stewart? A. Yes.

Mr. MILLER.—I want to offer that in evidence, any objection? [229]

Mr. GRINSTEAD.—The same objection.

The COURT.—Objection overruled, it will be admitted.

Mr. GRINSTEAD.—Exception.

Said letter was thereupon received in evidence and marked as Plaintiff's Exhibit 14.

Mr. MILLER.—I think that is all, you may cross-examine him.

Cross-examination.

(By Mr. GRINSTEAD.)

Q. Mr. Magill, as I understand your testimony,—if I am not correct, I want you to straighten it out now,—it is to the effect that Stewart had some interest in certain boats prior to the time this Northwest Transportation Company was organized and that in-

(Testimony of W. F. Magill.)

terest was merged into the formation of a corporation and in that corporation you held his stock really in trust for him; is that the essence of your testimony? A. Well, that is the essence.

Q. And I understood you to testify that Stewart ran the Company. Now, isn't it a fact that Mr. Shepherd was running the Company?

A. Mr. Shepherd took part of the stock of the Independent Navigation Company,—

Q. Before you go on with that, may I ask you if you know why he took that over?

A. Yes. He and Mr. Ayers, who was also a client of mine, Ayers and Mr. Stewart, made a trade whereby Mr. Ayers took a farm and Mr. Stewart took over the Independent Navigation Company. [230]

Q. Before that deal was made, wasn't there a mortgage upon the Navigation Company's property? A. There might have been, I am not sure.

Q. Running to the Kelso State Bank?

A. There may have been.

Q. And Mr. Stewart made this deal in order to save the Company, in order to put it over into a paying Company if possible, in order to prevent the Bank from sustaining a loss.

A. I do not recollect,—

Q. You do not know whether that is true or not?

A. I do not know whether the Independent Navigation Company was mortgaged to Stewart or not.

Q. I think that the bank's records here show that prior to these transactions that you have testi-

(Testimony of W. F. Magill.)

fied to, the Kelso State Bank held a chattel mortgage of \$7,500 on the steamer "Olympian," which was the property of this Independent Navigation Company. Do you know whether that was true or not? A. I do not remember, no, sir.

Q. You would not say that is not true.

A. No, I would not say. I do not know as to that. I might have had some intimation of it at one time, but I do not recall now. I know later on there were mortgages made and I made them.

Q. The Independent Navigation Company owned the steamer "Olympian"? A. Yes.

Q. Up to the time you dissolved that organization, and then the Northwest Transportation Company owned the "Olympian"? [231] A. Yes.

Q. You do not know what became of the mortgage which the Kelso Bank held upon the "Olympian"?

A. I do not know what mortgage you refer to, there are a good many of them.

Mr. GRINSTED.—You concede there was a mortgage previous to these?

Mr. MILLER.—I do not know anything about that, but they did get a mortgage from the Northwest Transportation Company on that boat, which was on it at the time the Bank failed.

Q. Now, isn't this the history of that matter, Mr. Magill: that up to the time of the transactions you have testified to, the Kelso Bank had a mortgage on this boat: that Frank Shepherd bought the boat, paid off the mortgage that was

(Testimony of W. F. Magill.)

due the boat, turned the boat over to the Northwest Transportation Company in payment of capital stock, and that subsequent to that time, the Northwest Transportation Company borrowed money of the Kelso State Bank, and gave a mortgage to the Kelso State Bank on that boat.

A. The question is,—

Q. I am reciting what I understand to be the chain of evidence. I ask you whether or not that is true or untrue.

A. No, I am sure that is not true, that is all of it.

Q. How much of it is true?

A. I think the Northwest Transportation Company later on gave a mortgage on the boat to the Kelso State Bank; that much I am satisfied of, but Mr. Stewart originally owned this boat before Frank Shepherd ever knew about it, and the Northwest Transportation Company was organized some time before I ever knew Frank Shepherd ever had anything to do with it. The first time I knew Frank Shepherd had anything [232] to do with it, was when Mr. Stewart came into our office with stock assigned by Mr. Kellogg and two other stockholders and said he had made some deal with Mr. Shepherd and had the stock divided up at that time.

Q. Do you know whether or not at that time the Kelso State Bank had any lien of mortgage or otherwise upon this boat?

A. I do not know that.

Q. You did not know that? A. I did not.

(Testimony of W. F. Magill.)

Q. Do you know where or of whom Mr. Shepherd acquired that boat that you say that he owned before Shepherd ever came into the matter.

A. You misunderstood me.

The COURT.—You have it the wrong way around.

Mr. GRINSTEAD.—Yes, I will change that, I misstated myself there. Stewart you say, was the owner? A. Of the “Olympian.”

Q. Stewart owned the “Olympian” before Shepherd ever came into the matter?

A. Before I ever knew anything about Shepherd.

Q. Didn't Stewart sell to Shepherd direct rather than to the Transportation Company?

A. I think not. I know Mr. Stewart took over the boat from the Independent Navigation Company and organized the Northwest Transportation, a good many months before I had any knowledge that Mr. Shepherd had anything to do with it, and the first knowledge and first record of Mr. Shepherd having anything to do with the company was about March 10, 1920.

Q. You have all of the records,—you are still secretary [233] of the Northwest Transportation Company?

A. No, I am not. A man by the name of Davenport is.

Q. You took these records from his possession when you came up here to testify.

A. No, no; they have been in my office for months and months.

(Testimony of W. F. Magill.)

Q. Did you bring all of the corporate records with you?

A. All that I have; that is all I have, just that book and the papers in the back of it.

Q. Well, those papers that were put back in your file, I did not have a chance to examine them. We can save everybody a lot of time if you will take that corporate record and those other papers you have, and tell us whether you find anything in the documents tracing the history of this matter back, back of March 10, 1920, so that we can find out what the facts are. What I am really endeavoring to show, is that all of Stewart's dealings in this matter, were actually in an effort to protect the bank on loans that had been made, and he reorganized the company, took the boat over and reorganized the company into a new company, and got Shepherd into it, and went ahead all the time trying to protect the loan that had been made by the bank?

Mr. MILLER.—Which is not the situation.

Mr. GRINSTED.—I am asking the witness what he knows about this and I am telling him candidly what I am trying to get at.

A. I do not understand it that way, no.

Q. Do you know whether the bank had any interest in the boat prior to the time of this mortgage that counsel has handed me of the Northwest Transportation Company. Do you know anything about that? [234]

(Testimony of W. F. Magill.)

A. I know about that because it was in the book there, and I saw it. That is all, I did not draw it.

Q. You do not know whether previous to that there was any interest claimed by the Kelso bank, of any kind, in and to the boat?

A. There seems to me there was a mortgage prior to that.

Q. To the Kelso bank?

A. Yes, by the Northwest Transportation Company.

The COURT.—Is that mortgage in evidence.

Mr. GRINSTEAD.—It has not even been identified.

Mr. MILLER.—I handed it to counsel.

Mr. GRINSTEAD.—It is not identified or anything yet.

Mr. MILLER.—It is a mortgage of the Northwest Transportation Company to the bank on this steamer "Olympian."

Mr. GRINSTEAD.—You think there is a prior mortgage to the one I hold? I think we had better get this identified.

Mr. MILLER.—I will admit it in evidence as far as I am concerned.

Mr. GRINSTEAD.—We ask that the mortgage be identified here for the present.

The CLERK.—It will be Defendant's 3-A.

Mr. MILLER.—I will offer it in evidence and make it one of my exhibits.

Mr. GRINSTEAD.—All right, let it go in as one of his exhibits.

(Testimony of W. F. Magill.)

Thereupon said mortgage was received in evidence and marked Plaintiff's Exhibit 15.

Mr. GRINSTEAD.—This is a mortgage of June 29, 1920.

Q. Now I understand, Mr. Magill that your recollection is [235] that the Kelso bank is interested in this matter prior to this note and that the mortgage or note that I hold being a part of Exhibit 15, and being dated June 29, 1920,—

A. I think there is a mortgage prior to that. I cannot tell you positively, but I feel quite sure of it. I think the correspondence shows it somewhere.

Q. Have you that correspondence here?

A. What is the date of the letter to Hull, does that refer to the,—

Mr. GRINSTEAD.—That letter you had here a moment ago. You are now referring to Plaintiff's Exhibit 13?

A. Yes, what is the date of that, is that prior?

Q. Yes.

A. Well, this is where I got part of my information from. It says, "I accepted from the Company a new mortgage, \$6,000 and carried it until past due, and accepted a note of \$6,500."

Q. This is a copy of a letter from Mr. Stewart to Mr. Hull? A. Evidently.

Q. It was signed by Mr. Stewart as cashier of the Kelso State Bank? A. I cannot tell that.

Q. Of course that letter speaks for itself.

A. It came with this letter.

(Testimony of W. F. Magill.)

Q. It came with that letter to you of November 13, 1919, which is signed by Stewart as Cashier of the Kelso State Bank? A. Yes.

Mr. GRINSTEAD.—That is Exhibit 13, your Honor.

WITNESS.—That is the enclosure that is referred to in the letter. [236]

Q. Now, do you have any other knowledge as to the interest of Stewart or the Kelso State Bank in any form either by general indebtedness of the boat or owners of the boat, or by secured indebtedness of the boat or owners of the boat,—any information on that point,—if you have, I would like to have you tell us what it is.

A. I do not recall anything special. My recollection is that Stewart acquired the stock of the Independent Navigation Company and held that in that shape for about a year, some months anyway, before the new company was organized.

Q. Yes, and do you know whether or not, prior to the time that Stewart took over, as you say, the stock of the Independent Navigation Company, the bank had loaned money in any form to the Independent Navigation Company?

A. I do not know that.

Q. You do not know that? A. No.

Q. Then so far as you know, Stewart had taken over the stock in his name of the Independent Navigation Company, might have been actually acting as trustee for the bank to protect some loan that they had made.

(Testimony of W. F. Magill.)

A. I did not know as to how that came up at all, except I know he made a trade for a ranch.

Mr. MILLER.—That is how he got the stock?

A. I say that the only thing I know about it is that he and Mr. Ayers, made a trade, which was conducted through my office, a good deal of it, and Stewart had traded the ranch for the stock and interest of the Navigation Company. He took over all of Ayers' interest, that was [237] nearly all of it, and gathered up the rest of the stock.

Q. How nearly can you fix the date when you say that Mr. Stewart took over the Independent Navigation Company's stock?

A. Well, it was quite a while prior to the record of the dissolution of the company, and that was March 1920. How near, you ask me, I would say about a year before that.

Q. A year prior to that? . A. Yes.

Q. So that it would be some time in the early spring of 1919 that the stock of the Independent Navigation Company came into Mr. Stewart's hands as near as you can recollect it?

A. I have the original stock of the Independent Navigation Company there, I do not know whether that would show or not.

Q. Come on down and look over these files.

A. Yes, there is a letter I wrote to Mr. Stewart, I wrote in November. What is the question?

Q. The question is we are trying to trace when

(Testimony of W. F. Magill.)

Mr. Stewart took over the Independent Navigation Company.

A. I know he took over some of it prior to September 1919.

Q. (By Mr. MILLER.) We had a contract this morning with a lot of recitals in it, have you got that contract now? A. No.

Q. What became of the files of the dissolved corporation? A. What became of what?

Q. The corporate records that were issued when Stewart acquired this stock?

A. I do not know, Mr. Grinstead. I think Mr. Senn, former secretary, possibly still has them. I never had the [238] records of the company.

Q. He is in Portland? A. Yes.

Redirect Examination.

(By Mr. MILLER.)

Q. I will call your attention to these minutes, Exhibit 11, minutes written by yourself.

A. November, 1920?

Q. Yes.

A. I was not present at that meeting. The only meeting I was present at was the meeting of March, 1920. This one was while I was in Texas and the correspondence shows that.

Mr. MILLER.—It seems from this there was no mortgage on the property at all.

Recross-examination.

(By Mr. GRINSTEAD.)

Q. Let me ask one more question. You referred, a little time back, to some correspondence

(Testimony of W. F. Magill.)

which would show something pertaining to these matters; has all of that correspondence gone in evidence that you referred to?

A. I do not know. There are several letters here. I think that all have been introduced.

Q. Would you glance through this and see if there is any thing that will enlighten us on this question of prior indebtedness to the Kelso State Bank.

Mr. MILLER.—You will have to look them over before you can do that.

(Witness left the stand.) [239]

October 30, 1922, 3:00 o'clock, P. M.

Mr. MILLER.—I have two witnesses that are short and Mr. Grinstead consents that they may be called before he goes on with the cross-examination of Mr. Adams.

Testimony of J. M. Ayers, for Plaintiff.

Mr. J. M. AYERS, a witness called by the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. State your name to the Court.

A. J. M. Ayers.

Q. Where do you live? A. Portland.

Q. Have you ever lived at Kelso? A. Yes.

Q. Did you know F. L. Stewart? A. I did.

Q. Former cashier of the Kelso bank?

A. Yes, sir.

Q. Did you ever have any dealings with him

(Testimony of J. M. Ayers.)

in connection with the Independent Navigation Company? A. Yes, sir.

Q. And the steamer "Olympian"? A. Yes.

Mr. MILLER.—This testimony is preliminary to other matters which will be later connected up. It might not show its [240] relevancy right now.

Q. You say that you were connected with the "Olympian"? A. I was; yes.

Q. At one time did you own that boat or interest in the boat? A. I owned it outright at first, yes.

Q. And to whom did you sell it?

A. I sold all of my interest later on to F. L. Stewart, of Kelso.

Q. To F. L. Stewart? A. Yes, sir.

Q. Was it then not formally held by the corporation?

A. This company was then a corporation and I held it, while I think we were incorporated, I do not know exactly when we were incorporated.

Q. I have the articles of incorporation here. Do you remember what year it was?

A. It seems to me it was in the Spring of '16. I would not make that positive.

Q. For the purpose of refreshing your recollection, I will show you this paper which purports to be the articles of incorporation. Is that your signature down there? A. It is.

Q. When was it?

A. This is on February 13, 1917?

Q. Yes.

A. Yes, I was mistaken.

Q. You were one of the owners of the stock of

(Testimony of J. M. Ayers.)

the corporation, the Independent Navigation Company?

A. I was the owner of 83 shares, I believe.

Q. How many shares were there? [241]

A. There were 100, as I remember. No, we were incorporated for \$13,000, at \$100 a share.

Q. For the purposes of this case, I want to show Stewart's connection with it, I do not care about the other shares. Now you spoke of selling Stewart some of your stock.

A. I would not say when, but it was along about the middle of '17 that I transferred 41 shares of stock, or half of what I owned at that time, for a piece of land, for his half interest in a piece of land which we jointly held together at that time.

Q. And later did you transfer to him or sell to him the balance of the stock in the company?

A. Well, later I transferred just by assignment of stock to him, the balance of my interest, along with the note which I held against the company.

Q. When was that?

A. That was, I think, I transferred all of it some time in November, the later part of '17, along about November some time.

Q. And from that time on, who was the owner of the stock if you know?

A. So far as I know, Mr. F. L. Stewart owned all the stock in the company.

Q. I show you a certificate of stock.

A. That is the stock which I traded for the land, as I remember it.

(Testimony of J. M. Ayers.)

Q. In the fall of 1919? A. In June of 1919.

Mr. MILLER.—I want to offer this certificate in evidence. This is done for the purpose of showing that Stewart was [242] the owner of the Independent Navigation Company. There are several of these notes involved in this case which are traceable back to these Stewart manipulations of this company.

The COURT.—They will be exhibit number 19?

The CLERK.—Number 19 for the plaintiff.

The COURT.—Admitted.

Said certificate of stock was thereupon received in evidence and marked Plaintiff's Exhibit 19.

Q. When you sold the Steamer "Olympian" to the Navigation Company, did you take a note back from them?

A. Yes, sir, I took a note back for \$4,800.

Q. What became of that note later?

A. I turned that note over to Mr. Stewart in exchange for a first mortgage on a tract of land that lies in Washington County, Oregon.

Q. Did that have anything to do in that connection with the balance of the stock you owned?

A. When I traded this note I turned over the balance of the stock to him.

Q. Did you have Magill draw a contract for you at that time?

A. Yes, sir, as I remember it we did.

Mr. MILLER.—That is all, you may cross-examine. [243]

(Testimony of J. M. Ayers.)

Cross-examination.

(By Mr. GRINSTEAD.)

Q. You are the Mr. Ayers who was a director of the Kelso State Bank?

A. I was at one time, yes, sir.

Q. Between what periods?

A. Well, I could not tell you just exactly between what periods. I was for several years, anyway.

Q. For several years? A. Yes.

Q. Commencing as early as 1914?

A. Possibly so.

Q. Running for some years after that?

A. No. I think it was not for some years after that, because I have not been a director, I do not think, for the past three years, possibly four years.

Q. You have not been a director the last four years? A. No.

Q. But from that time back?

A. Prior to that I was for several years, for three years.

Q. Several years prior to 1917?

A. To 1917, I believe.

(Witness excused.) [244]

Testimony of W. F. Magill, for Plaintiff (Recalled).

W. F. MAGILL, being recalled, continued his testimony as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Now, you know Mr. Ayers, who was just on the witness-stand? A. Yes.

(Testimony of W. F. Magill.)

Q. Of course you testified you knew Mr. Stewart?

A. Yes.

Q. Did you draw the articles of agreement between Mr. Stewart and Mr. Ayers, concerning this note he just testified to? A. Yes.

Q. Is the paper I hold in my hand a copy of that agreement?

A. That is a copy of that agreement.

Q. What became of the original agreement?

A. I do not know, that is the office copy that I had. I fished it out of my files yesterday.

Q. It is not signed? A. No.

Q. Is it a copy of the one that was signed?

A. Copy of the one that was signed and I prepared it and sent the original to Mr. Stewart to be signed, and the correspondence will show that.

Mr. MILLER.—I would like to offer this in evidence.

Mr. GRINSTEAD.—As I get it, all of this testimony, as I understand it, is preliminary.

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—As far as it being a copy, if Mr. Magill knows the original was signed and is positive about it, I will not object to it as a copy. [245]

The COURT.—Admitted.

Mr. GRINSTEAD.—Of course all of this testimony is going in over our objection, but you say that it is preliminary, so that I will not urge it.

Thereupon said copy of contract was received in evidence and marked as Plaintiff's Exhibit
20.

(Testimony of Fritz Kruze.)

Mr. MILLER.—That is all with this witness.

Mr. GRINSTEAD.—No cross-examination.

(Witness excused.) [246]

Testimony of Fritz Kruze, for Plaintiff.

FRITZ KRUIZE, a witness called by the plaintiff, being duly sworn testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Your name is Fritz Kruze? A. Yes, sir.

Q. You are living at Portland at the present time?

A. No, Kalama at the present time.

Q. Did you know F. L. Stewart, the former cashier of the Kelso State Bank? A. Yes.

Q. How long had you known him?

A. I have known him ever since I have been seven years old, it has been about twenty-six years.

Q. Your folks lived together above Kelso, did they? A. Yes, sir.

Q. Did you ever work for Stewart? A. Yes.

Q. In what capacity?

A. I worked as a steamboat promoter for him and as captain for him.

Q. Now, did you at any time give a note either to the bank or Mr. Stewart for \$5,000? A. Yes, sir.

Q. What was said to you at that time by Mr. Stewart?

Mr. GRINSTEAD.—Now, just a moment,—

Mr. MILLER.—Later that note was divided into

(Testimony of Fritz Kruze.)

two notes which have been introduced in evidence as Exhibit 4. [247]

Mr. GRINSTEAD.—Go ahead.

(Question read.)

Q. What was said about the giving of the note?
At the time,—

Mr. GRINSTEAD.—At the time of the giving of the original \$5,000 note?

Mr. MILLER.—Yes.

Q. What do you call the original, the \$5,000 or the two.

Q. At the time of the original note?

A. At the time of the original note it was just simply to help Mr. Stewart out.

Q. What did Stewart say about that?

A. He did not say anything. He just said “Kruze, if you will sign this for \$5,000, it will help me out.”

Q. Was there any consideration at all for your signing it? A. It was none whatever; no sir.

Q. And you signed the note? A. I did, sir.

Q. Did you have any means of paying the note, or were you to pay it?

A. I had no means and I was not supposed to pay it.

Mr. GRINSTEAD.—I think the testimony there in the latter part of the answer is purely a conclusion of the witness under his previous testimony.

The COURT.—It may be stricken.

Q. What was said to you about paying the note?

(Testimony of Fritz Kruze.)

Mr. GRINSTEAD.—He has already answered that.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception.

Q. What was said to you about paying the note, if anything?

A. Mr. Stewart said he would pay the note and pay all the [248] interest; my signing the note would not have anything to do as far as I was concerned, and I had the note paid up. I have not it with me, but I can produce it.

Q. Later he surrendered that note to you?

A. Yes.

Q. What did you do when he surrendered the note to you?

A. I took the note and put it in my pocket and went back to Portland.

Q. Did you give any other notes?

A. No, sir; not at that time.

Q. When did you give any other note?

A. That was about three months after that.

Q. What did you give him then?

A. I gave him two \$2,500 notes.

Q. Those two notes I now show you, which have been admitted in evidence and marked plaintiff's Exhibit 4.

Mr. GRINSTEAD.—I think under this testimony I should have objected to all of this testimony from this witness as the testimony produced here shows that the \$5,000 note is paid and surrendered, that

(Testimony of Fritz Kruze.)

is what they are suing us on here. These notes here are not renewals under the testimony.

The COURT.—They have some evidential value.

Q. You say that \$5,000 note given by you was marked paid? A. Yes.

Q. Has the date on it with a stamp?

A. It sure has.

Q. Was it paid?

A. I do not know whether it was paid, I cannot testify to that. I have his stamp on it. [249]

Q. Did you pay anything on it?

A. No, sir; I did not.

The COURT.—I think the objection may be overruled.

Q. Then you gave him these two notes?

A. Yes, sir.

Q. Why did you give them?

A. I was supposed to have a mortgage on the steamer "Olympian."

Q. Did he ever give you a mortgage?

A. I got nothing but a \$50,000 rating which was not worth anything.

Q. Who made out that rating for you?

A. Mr. Stewart.

Q. I now hand you a paper, was that the paper he made out?

A. This is the paper here. I signed it and Mr. Stewart made it out after I signed it.

Mr. MILLER.—I would like to offer this in evidence for the purpose of showing Stewart's dealings with this man and the public.

(Testimony of Fritz Kruze.)

Mr. GRINSTEAD.—I object to that as incompetent, irrelevant and immaterial and not tending to prove any issue pleaded in this case. I want to call the Court's attention to the fact that we are sued on a claimed appropriation occurring on the 10th day of September, 1920, and that this is a statement that bears date of February 1st, 1921.

Mr. MILLER.—It bears upon the issues.

The COURT.—Is that the rating he speaks of?

Mr. MILLER.—That is that rating.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception please.

Thereupon said rating was received in evidence and [250] marked as Plaintiff's Exhibit 23.

Q. Now, Mr. Kruze, in this rating, it states that you are half owner of a boat. Did you ever own any half of any boat? A. No, sir; I did not.

Q. It rates you as being worth \$50,600. Were you worth that sum or any sum? A. No, sir.

Q. What were you doing?

A. I was not doing anything at that time.

Q. Just working? A. I was broke; yes, sir.

Q. You were a laboring man?

A. A laboring man.

Q. And practically broke?

A. Broke at that time.

Q. So that these figures were absolutely erroneous?

A. Absolutely; they were made out after I signed the paper.

(Testimony of Fritz Kruze.)

Q. And left that paper with Mr. Stewart?

A. Yes, sir.

Q. You never got any consideration for any of these notes? A. No, sir; had nothing to give.

Q. And I believe you testified you were not to pay it? A. Yes, sir, I was not to pay them at all.

Q. Did Stewart tell you why he wanted them?

A. He never said anything as to why he wanted them or anything at all. He said it will be a help to me, that is all he said.

Q. Have you got that other note? [251]

A. I have it home, yes, sir, I have not it with me.

Q. Could you forward that note down here to the Court? A. Yes.

Q. To-night?

A. No, I could not do it until to-morrow noon. It is in Portland.

Q. I am asking you about that note you gave Stewart first, that was handed back to you and he had marked it paid, you said? A. Yes.

Q. But you never paid it yourself? A. No, sir.

Mr. MILLER.—That is all, you may cross-examine him.

Mr. GRINSTEAD.—No questions.

(Witness excused.) [252]

Testimony of Arthur Fletcher, for Plaintiff.

ARTHUR FLETCHER, a witness called by the plaintiff, being duly sworn testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Your name is Arthur Fletcher? A. Yes.

Q. You live in Vancouver? A. Yes.

Q. What is your business?

A. I am owner and manager of the Fletcher Abstract & Loan Company.

Q. You make abstracts? A. Yes.

Q. Do you also pass upon real estate values and things of that character? A. Sometimes.

Q. Are you acquainted with a tract of land purchased by Mr. Phillips from Mr. Stewart?

A. I am acquainted with one tract.

Q. The tract at what is known as Fruit Valley?

A. Yes.

Q. Did you make an abstract covering the title to that property from the time Mr. Stewart acquired it down to the present? A. Yes.

Mr. MILLER.—I would like to offer in evidence this abstract.

Mr. GRINSTEAD.—He has not identified it yet.

Q. The abstract I hold in my hand is the abstract you made? [253] A. Yes, that is it.

Q. When did you make this?

A. I made it yesterday.

Mr. MILLER.—Then we will offer this in evidence.

Thereupon said abstract was received in evidence and marked as Plaintiff's Exhibit #24.

Mr. MILLER.—There are two mortgages shown on this abstract. One for \$3,000 given by Phillips to Stewart of date March 18, 1918, and another dated December 18, 1920, for \$3,500 and we found among the bank papers,—

The COURT.—Two notes secured by mortgages?

Mr. MILLER.—I do not know whether there are two notes or not, but there are two mortgages. There was a letter which Mr. Adams found among the records of the bank, dated March 16, 1921, apparently written by Stewart the day before the bank failed, which we wish to offer in evidence, as it is an explanation of these mortgages. Apparently this second mortgage was to take up the first mortgage, and the first mortgage was not satisfied, because Mr. Stewart disappeared the next day.

Mr. GRINSTEAD.—There will be no objection made to the fact that counsel produces a copy instead of the original. We will object that it is not material to the issues in this case.

Mr. MILLER.—I do not particularly care whether it goes in or not, but the record shows there are two mortgages on the property, and one of them is intended to be a renewal of the other.

The COURT.—It may be admitted.

Mr. GRINSTEAD.—Exception. [254]

Thereupon said letter was received in evidence and marked as Plaintiff's Exhibit #25.

(Testimony of Arthur Fletcher.)

Q. There is another letter of January 3, 1920, written by Stewart to Mr. Oyster, that may go as a part of the other exhibit, referring to the same matter.

The COURT.—Exhibit No. 25, two letters.

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—The same status as to both as far as our objection is concerned.

The COURT.—Yes, objection overruled.

Mr. GRINSTEAD.—Exception.

Mr. MILLER.—Q. Mr. Fletcher, you made this abstract which has been offered in evidence and this plat?

A. Yes, I made that hurriedly yesterday.

Q. This plat shows in a general way the property as described?

A. It shows in general the location of the property and the shape of it.

Q. Now, you have had experience in fixing the values of property in that locality? A. Yes.

Q. You have been in the abstract business for many years? A. Fifteen years.

Q. And have had occasion to examine property, and you were also treasurer of that county for a time, were you not? A. Yes.

Q. How long? A. Four years.

Q. How long have you known this property in a general way?

A. Oh, for possibly thirty or thirty-five years.
[255]

(Testimony of Arthur Fletcher.)

Q. What would you say would be the value of this property?

Mr. GRINSTEAD.—We object to that as incompetent, irrelevant and immaterial, not within the issues pleaded in this case and indefinite as to time.

Q. Well, at any time.

The COURT.—Did you say that you are acquainted with real estate values in that section?

A. I have lived within five miles of that property for fifty years.

Q. Do you know real estate values there?

A. I think I do.

Q. And you are acquainted with this particular property? A. Yes.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception.

Q. Go ahead and answer the question.

A. I would say that the property was worth \$8,900 or \$9,000.

The COURT.—That is the property covered by this abstract.

A. Yes.

Q. And covered by the mortgages? A. Yes.

Mr. MILLER.—That is all.

Mr. GRINSTEAD.—No questions.

(Witness excused.) [256]

Testimony of George F. Plamondon, for Plaintiff.

GEORGE F. PLAMONDON, a witness called by the plaintiff, being duly sworn testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Your name is George F. Plamondon?

A. Yes.

Q. You were in the Kelso Bank as one of its employees for a number of years? A. Yes.

Q. How long?

A. From September 1908 until the bank was closed.

Q. You knew Stewart, of course? A. Yes.

Q. I wish you would tell the Court what position Stewart occupied in that bank,—I do not mean whether he was cashier, but in what way did he control or dominate the bank?

A. He was the cashier and manager of the bank.

Q. And so far as his conduct was concerned, he actually handled the bank? A. I beg pardon.

Q. So far as his conduct was concerned, he actually handled and controlled the bank?

A. Why, Mr. Stewart did most of the active management of the bank, to my recollection.

Q. Did you take all of your orders from Mr. Stewart? A. Yes.

Q. Do you know anything about Stewart, during the time you [257] were in there, whether he was dealing with outside matters more or less?

A. In a general way, yes. I know he had things

(Testimony of George F. Plamondon.)

on the side, as you say, investments, etc., I never was very familiar with them, but I know he had business aside from the bank.

Q. There has been some evidence here that you wrote some letters to Wallace & Mosier and the Triumph Machinery Company. State whether those letters were under the direction of Stewart, or whether you were connected in any way with them yourself?

A. All the letters I wrote for the bank on that line, or any other line, were written directly at Mr. Stewart's request and suggestion. If, for instance, there were notes to renew, he would ask me to render a statement of the note and interest, and that sort of thing. I presume as to the letters, it would be the same thing, along the same line.

Q. You personally knew nothing about these people?

A. No, sir; as far as I can remember, I never met them. I never have seen them, as far as I can recall.

Q. If Stewart was away for a time, how was the business of the bank taken care of?

A. Well, Mr. Stewart would usually telephone me quite frequently if he was away. He never went away far, to Portland and Tacoma, and he always was in telephone communication with us once or twice a day while he was gone, most always.

Q. Were the loans and things of that character controlled by Stewart, the making of loans?

(Testimony of George F. Plamondon.)

A. Yes, sir. Mr. Stewart attended to the making of loans. [258]

Q. Entirely? A. Yes.

Q. Did you have any authority yourself to make any loans?

A. No, sir; except in some small loans. I have made several small loans, inconsequential loans, which did not amount to very much.

Q. Do you know the Fidelity & Deposit Company that is defendant in this suit?

A. I know them through their general agency, Hansen & Rowland.

Q. Were you their local agent at Kelso?

A. Yes.

Q. While you were in the bank?

Mr. GRINSTED.—Just a moment, the witness answered a little too quickly for me there. I think that under our statute his oral statement is not the best evidence, so far as the companies are concerned. Now, in explanation, I will concede that Mr. Plamondon represented Hansen & Rowland of this city in the city of Kelso at certain times,—I do not know when they were, but when he comes to testifying that he is an agent of the surety company under the statute, there is required to be certain written evidence of that, limitations of that, and therefore I object to the question as not calling for the best evidence.

The COURT.—Objection sustained.

Q. Well, did you do any business for the Fidelity

(Testimony of George F. Plamondon.)

& Deposit Company in the way of securing business for them? A. Yes.

Q. Covering how long a time?

A. Well, I was associated with Mr. Stewart in the agency, [259] under the name of Stewart & Plamondon, for two or three years, and then about the latter part of '18 or the first part of '19, I bought out Mr. Stewart and from then on, I was the agent myself.

Q. What was the character of the business that you transacted for them?

A. It was sureties, surety bonds, and maybe a little liability.

Q. And how long was Mr. Stewart connected with them prior to that time, as far as you know?

A. I could not say exactly.

Mr. GRINSTED.—I do not see the materiality of this testimony, under the issues in this case; therefore I object on that ground.

The COURT.—Objection overruled.

Mr. GRINSTED.—Exception.

Q. How long was Mr. Stewart with them.

A. I can only say in a general way, I know he represented them, I believe, when I first came into the bank, as far as I remember.

Q. How long ago was that?

A. That was 1908, that is, as I recollect. I would not make that as a positive statement. I do not really remember positively. I believe he was their agent then, and prior to that. That is the extent of my recollection.

(Testimony of George F. Plamondon.)

Q. Later on, you and he were together, and then you took it up individually? A. Yes.

Q. And continued until the bank failed?

A. Yes. [260]

Q. You were in the bank as assistant cashier for how long?

The COURT.—He said from September, 1908, until the bank closed.

Mr. MILLER.—He did not say he was assistant.

A. I was assistant cashier for several years, but I have really forgotten.

Q. You were assistant cashier for several years prior to that date? A. Yes.

Q. And prior to that date, what was your official title?

A. Well, I had none. I was bookkeeper and clerk and general roustabout.

Cross-examination.

(By Mr. GRINSTEAD.)

Q. When you say that Stewart was agent for the Fidelity & Deposit Company, you mean that he represented Hansen & Rowland in soliciting bonds, do you not? A. Yes.

Q. Do you not? A. Yes.

Q. And Hansen & Rowland were agents for the Fidelity & Deposit Company for bonds in South-western Washington? A. Yes.

Q. Now, those letters that counsel has asked you about were written by you, and you testified that they were written under instructions from Mr.

(Testimony of George F. Plamondon.)

Stewart. Did those letters state the truth, or were they falsifying?

A. So far as I know, they were never falsified.

Q. They were always in accordance with the records of the [261] bank?

A. Yes, so far as I know; so far as I understood them, yes, indeed.

Q. You say that you knew of Stewart's outside plans and dealings. Did he make any secret of his outside dealings?

A. I said I knew of them in a general way. I knew he had outside business.

Q. Was that a matter of any secrecy on his part?

A. Not particularly. Not that I know of.

Q. Of all these outside deals that were entered into and were later entered into the bank business, were put on the bank records so that anybody could tell what they were? A. So far as I know.

Q. That is your recollection?

A. Yes, that is my recollection.

Q. Now, prior to the time you became assistant cashier of the bank, your brother was assistant cashier, was he not? A. Yes.

Q. That is Mr. Lew M. Plamondon? A. Yes.

Q. When did he go into the bank, if you know?

A. Well, that would be, it must have been around 1904 or 1905.

Q. And when did he go out of the bank? Were you and he both there for a time?

A. Yes, for a time. I believe it was around 1909 or '10 that he left there.

(Testimony of George F. Plamondon.)

Q. And when he left there, where did he go?

A. He went to Woodland.

Q. So that he went out of this bank and took charge of the Woodland State Bank? [262]

A. Yes.

Q. And you think that was in 1909 or '10?

A. That is my recollection, somewhere along there.

Q. And you were promoted to assistant cashier when your brother went out?

A. I could not answer just exactly. There were three of us there, besides Mr. Stewart. When my brother left, Mr. Knight was promoted to the position my brother had occupied, and some time afterwards Mr. Stewart also appointed me assistant cashier, but I believe a little later on.

Q. So that there were two assistant cashiers for a time? A. Yes.

Q. And Mr. Knight left the bank subsequently?

A. Mr. Knight left the bank, I would say about 1918, as I recall.

Q. Now, in a general way, what was the organization of the forces of the bank, and their respective duties,— let's take them one by one: what did Mr. Stewart do as cashier and manager? He took general charge of the loans, you say? A. Yes.

Q. I understood you to say that on minor matters, you handled the loans if he was not there, or was busy? A. Yes.

Q. Who handled the matter of counting the cash, and so on?

A. Well, we had three wickets, three windows;

(Testimony of George F. Plamondon.)

well, we really had four. Sometimes Mr. Stewart used his window for note collections and that sort of thing. We had our work divided in sections. There were books for the cages. I had mine [263] and Mr. Dunham, Elden Dunham, the gentleman here would have in connection with his bookkeeping, also a window where he would cash checks and also receive deposits.

Q. That is, the three of you made entries in your cage-books?

A. We had a young lady there with us.

Q. Miss Waugh? A. Miss Waugh.

Q. And she handled the bookkeeping?

A. She did the general work and also worked in a cage.

Q. She had a cage? A. A window, yes.

Q. And she kept a cage record? A. Yes.

Q. Of such transactions as she handled?

A. Yes.

Q. Who consolidated the entries from the several cage-books, who handled that, had charge of that?

A. That was part of my work.

Q. That was part of your duties, so that in your day's work, you, as assistant cashier, would take a summary from the cage-book of the other people, including Mr. Stewart's and you would consolidate the entries in the general books?

A. Yes. What we called the general books.

Q. The bank had a board of directors?

A. Yes.

Q. The board of directors was there, at times, in the bank? A. Yes.

(Testimony of George F. Plamondon.)

Q. They held meetings? A. Yes.

Q. Sometimes you would attend those meetings, would you? [264]

A. Yes, I was sometimes called in, but for a few minutes, to take a memorandum of the meeting, the minutes.

Q. To act as a minute clerk of the meeting?

A. Yes, sir.

Q. You were not a member of the Board of Directors? A. No, sir.

Q. The members of the Board of Directors were whom? A. Mr. Carothers.

Q. F. M. Carothers?

A. F. M. Carothers, J. R. Catlin, until his death.

Q. Mr. J. M. Ayers?

A. Mr. J. M. Ayers. Now you are asking for the time immediately prior to the closing of the bank?

Q. Well, for the present, yes?

Mr. MILLER.—Ayers was not a director at the time the bank closed.

Q. Well, at the time the bank closed?

A. Mr. F. M. Carothers and J. R. Catlin,—

Q. At the time the bank closed?

A. No, Mr. Carothers was a director previous to that.

Q. When did Mr. Catlin go out?

A. I cannot recall the date. It must have been a year.

Mr. MILLER.—It is in the minute-book.

Mr. GRINSTEAD.—We will pass that.

(Testimony of George F. Plamondon.)

WITNESS.—Mr. Pat Baxter.

Q. Pat Baxter was a director all the time you were employed there, wasn't he?

A. Well, I do not know the time; the record should show.

Q. He was at the time the bank closed?

A. Yes. [265]

Q. And for a long time previous?

A. Yes, and Mr. James Wallace.

Q. Mr. James Wallace?

A. Yes. And Mr. Stewart.

Q. Mr. Stewart and Mr. Baxter, and Mr. Catlin, up to the time of his death, and Mr. Carrothers were directors for many years prior to the time that the bank closed, weren't they? A. Yes.

Q. And those directors, did they have an auditing committee for the purpose of passing upon the bank transactions and the loans?

A. I really could not say for sure. The records would show.

Q. Well, isn't it a fact that the same board of directors had meetings, and went over matters of loans there, within your knowledge; haven't you attended meetings where they were discussing paper that was good and paper that was bad and things of that sort?

A. I would have to answer that generally. On the moment I could not recall any specific instance. Whenever they came they always talked about the funds and loans and so forth.

(Testimony of George F. Plamondon.)

Q. Was the condition of the bank and what loans had been made submitted to them?

A. Mr. Stewart, each year, when the annual meeting was held, always prepared quite an elaborate *résumé* of the year's business and the condition of the bank.

Mr. MILLER.—Those would be a matter of record, and if they are, they would be the best evidence. You have been insisting on the best evidence.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Since counsel has suggested that, I call upon [266] counsel or Mr. Adams to produce the several reports that were handed in to the Board of Directors by Mr. Stewart as cashier, upon the occasion of the several annual meetings.

Mr. MILLER.—I have produced all we have got and they have been offered in evidence.

Q. I notice a set of minutes under date of June 20, 1917, which purport to be the annual meetings of the Kelso State Bank. I will show you those minutes and ask you if you know the signatures of the subscribers to those minutes, as secretary and chairman.

Mr. MILLER.—We will admit those signatures.

WITNESS.—Yes.

Q. That is Mr. Carothers' signature and Mr. Stewart's signature. A. Yes.

Q. You were not present at that meeting?

A. Yes, I was.

Q. You were present at that meeting?

A. Yes, of the stockholders.

(Testimony of George F. Plamondon.)

Q. As a matter of fact, you were there representing three shares of stock you yourself owned in the bank. A. Yes.

Q. And Mr. Carothers, Mr. Wallace, Mr. Stewart, Mr. Baxter, Mr. Catlin and Mr. Ayers were elected directors for the year 1917; is that correct?

A. Yes, sir.

Q. I notice a statement there about a general discussion of the business conditions, during which discussion a statement of new accounts received by the Kelso State Bank since [267] the first of January, 1916, was gone over, and it says a statement of those accounts is attached herewith. There seems to be no such statement attached.

Mr. MILLER.—Why, it may be somewhere else in these papers.

Mr. GRINSTEAD.—Yes, it may be.

Q. Do you recall in this meeting where they went over the condition of the bank?

A. I cannot recall that, but I recall having made the statement that is set forth here, of new accounts. I remember Mr. Stewart asked us to make a summary of new accounts for the preceding year, and we did that. There is quite a list of new accounts. We made up quite an elaborate list of them.

Q. Was that a practice that was followed every year, or was that an exception?

A. As I recall, this is the only time we ever did that.

Q. But it was customary to go over the matter of the accounts at the annual meetings, and the

(Testimony of George F. Plamondon.)

condition of the bank and for Mr. Stewart to make a report, you say?

A. Yes, he would make quite an elaborate report.

Q. Orally, or in writing? A. In writing.

Q. I have to go through here to see whether we have any of these reports, before I can really conclude this examination.

A. There were several of these reports. I cannot say whether he always made one, but there were several that he made.

Q. I notice the directors met here on January 20, 1917,—referring to the minutes of September 12, 1917, of a director's meeting, Mr. Catlin signed as vice-president [268] and Mr. Stewart subscribed as secretary?

A. I will say, as to Mr. Stewart, there is his signature, I am a little bit in doubt as to Mr. Catlin, I believe it is. I have forgotten what his signature looks like, but I think it is his.

Q. You saw that signature on a good many notes that went through the bank, where he was borrowing, didn't you?

A. Yes, I should be familiar with his signature, I have seen it enough times, and say that I think that is his. On the moment I could not recall his signature.

Q. I notice Mr. Stewart's signature to a meeting of the board under date of February 24, 1917,—

The COURT.—That is this same exhibit?

Mr. GRINSTEAD.—It is all in Exhibit 2-A. All of these that I have taken up with this witness have

(Testimony of George F. Plamondon.)

been out of that exhibit. I notice it says in this meeting of the directors of February 24, a letter from the Bank Commissioner was read, and various loans were gone over carefully; the reserve of the bank as of this date, shows to be 32%, and so forth. Were you present at that meeting?

A. So far as I know, I was not.

Q. You do not know whether you prepared these minutes, or not?

A. I would say that I did not.

Q. Now, this meeting of April 21, 1917, that is Mr. Stewart's signature there? A. Yes.

Mr. MILLER.—I think the Court ought to understand that nobody signed these minutes but Stewart.

Mr. GRINSTEAD.—That is not correct. There are a few minutes where other signatures are not attached, but the exhibit [269] will speak for itself. In the main, from two to five of them subscribed to the minutes, as I will show, by showing you the minutes themselves.

Q. I notice these minutes of April 21, 1917, naming the directors who were present, it says the general condition of the bank was gone over, a letter of the Bank Commissioner was read, and several excessive loans were discussed, and the cashier advised a reduction to \$12,000 had been effected in the group of loans known as the Cowlitz Bridge Company account, and a further reduction of approximately \$8,000 had been demanded; a statement was made that another group of loans would shortly be paid in cash; that the books of the bank showed

(Testimony of George F. Plamondon.)

a reserve of 33%. Were you present at that meeting?

A. So far as I know, I could not say.

Mr. MILLER.—Those minutes were only signed by Stewart.

Q. You do not know whether you wrote these minutes or not? A. I will say offhand I did not.

Mr. MILLER.—What is the use of reading these minutes at this time?

Mr. GRINSTEAD.—We will have to go over them some time. This witness was asked, along with another witness, if Mr. Stewart did not run the bank single-handed and alone. I want to go over the minutes for the purpose of showing that is not correct. I also notice that these minutes are not in chronological order, they have not been put together in that order.

Mr. MILLER.—I put them together myself.

Mr. GRINSTEAD.—So that as I read them through this way, I will have to back up occasionally. Here are the minutes [270] of the Board of Directors of the Kelso State Bank of July 9, 1917. These are also signed by Mr. Stewart alone, and there are some loans being discussed here that do not go into anything that is involved in this case; also that the reserve of the bank deposits was 26%.

Q. Were you present at that meeting?

A. So far as I know, I was not.

Q. The Board of Directors' meeting of August 22, 1915, do you remember anything of that meeting?

(Testimony of George F. Plamondon.)

A. No, sir.

Q. Going back to January 20,—there are some duplicate minutes in here, and this is also signed by Stewart?

The COURT.—When you said the last minute was signed by Stewart, you meant signed by Stewart alone?

Mr. GRINSTEAD.—Yes, signed by Stewart alone.

Q. Mr. Knight was a stockholder?

A. He owned 3 1/3 shares.

Q. In the minutes of this meeting of January 20, 1917, it refers to a statement of new accounts. I will ask you if this sheet which I show you in Exhibit 2-A is that statement? A. Yes.

Q. And did you get that up?

A. One of the other clerks and myself.

Q. Was it a true statement? A. Yes, sir.

Q. It was submitted to the stockholders?

A. Yes, sir.

Q. And on that date it showed some \$26,415.20 of new accounts opened? [271]

A. That was the total of those new accounts.

Q. I notice in this report, the opening of the account of the Seaside Packing Company for \$48.95, that is correct, that was when that account opened?

A. I took those records right from our books.

Q. That means that on this day the stockholders and directors were advised that they had opened an account with and were doing business with the Seaside Packing Company? A. Yes.

(Testimony of George F. Plamondon.)

Q. I notice in this record also where Max Johnson opened an account here of \$250. That is the same man that had the Seaside Packing Company or was running it, wasn't he? A. Yes.

Q. I notice a meeting of the Board of Directors, of January 8, 1918, at which Mr. Wallace, Mr. Baxter, Mr. Carrothers, Mr. Catlin and Mr. Stewart were present, and where by motion they instructed the cashier to depreciate the real account to \$25,000 and the furniture and fixtures account to \$6,000, the excess to be charged off to the profit and loss account, and it was then decided to apply for membership in the Washington Bank Depositors guarantee fund. Do you remember those matters?

A. I remember of our applying.

Q. You did apply? A. Yes.

Q. Did you become a member of that fund?

A. We did not.

Q. I notice where the directors fixed the salaries of yourself and Mr. Stewart, do you remember that?

A. I cannot recall being at the meeting. Was this an annual [272] meeting?

Q. No, this was a meeting of the Board of Directors, being the new board elected at the annual meeting which was held on January 8, 1918; also they decided to hold their monthly directors meetings on the last Saturday of each month at seven o'clock P. M. That is signed by Stewart alone.

A. Yes.

Q. Now, calling your attention to the so-called statement of the condition of the Kelso State Bank,

(Testimony of George F. Plamondon.)

at the close of business on February 13, 1920, as per transcript of general ledger, in connection with these minutes, I will ask you, did you know about that, did you know who wrote that?

A. Yes, Miss Waugh.

Q. Miss Waugh?

A. Yes. This is a form which we had to correspond with the figures and arrangements of our general ledger.

Q. What was the purpose of getting this up on those pieces of paper?

A. Mr. Stewart asked us to get up something that would give him a statement of the details of the business without referring to the ledger. So we got up this form, which we had printed, and Miss Waugh would make a copy off of the general ledger, and give Mr. Stewart a copy.

Q. That statement would be made up, and what was done with it?

A. I presume he would either throw it in the waste basket when he got through with it, or got the one for the next day,— [273]

Q. That was a daily report?

A. That was a daily report, for a desk record.

Q. I notice here what purports to be a letter signed by Mr. Stewart as cashier, to the stockholders and directors of the Kelso State Bank, under date of February 13, 1920. Did you know anything about that letter? That is all bound together in Exhibit 22-A?

A. I would say that I received one of these. I

(Testimony of George F. Plamondon.)

cannot recall at the moment, but I probably did as one of the stockholders.

Q. You remember the letter?

A. Yes. Yes, sir, I believe I did. I believe I have a copy of it amongst my old stuff. (Letter read to Court.)

Q. Now, I will ask you if this statement I called your attention to under date of February 13, is not the statement that went out accompanying his letter of February 10. Do you know?

A. I do not really know. I cannot really say yes or no.

Q. I notice here annual meeting minutes, meeting of the stockholders of January 18, 1918, signed by Mr. Carrothers and Mr. Plamondon as Secretary. Is that your signature? A. Yes.

Q. And is that Mr. Carrothers' signature?

A. Yes.

Q. You were present at that meeting? A. Yes. (Minutes read.)

Q. You testified that the bank made application for membership in the guarantee fund at one time?

A. Yes. [274]

Q. I will call your attention to a special meeting of the Board of Directors held January 8, 1918. Is that your signature? A. Yes.

Q. They give the officers authority to make application for entry into the indemnity bond,—the guaranty fund, I should say? A. Yes.

Mr. MILLER.—They never went on with it though,—I mean they were not taken in.

(Testimony of George F. Plamondon.)

Q. I notice here a set of minutes for February 9, 1918, signed by Mr. Stewart. That is his signature? A. Yes.

(Minutes read.)

Q. Another set of minutes signed only by Mr. Stewart as Secretary under date of March 9, 1918?

A. Yes.

(Minutes read.)

The COURT.—Do I understand that it said there that the cash reserve was 40%?

Mr. GRINSTEAD.—Yes. 40% reserve against deposits.

Q. In 1918? A. March, 1918.

The COURT.—Have you any way to verify that from the books?

Mr. MILLER.—I do not think that the bank ever got below the legal reserve. What broke the bank was the vast loans that Stewart was making. The bank at the time it was closed had a legal reserve, but had \$150,000 worth of paper that could not be collected.

The COURT.—Do I understand that they had cash equal to [275] 40% of the deposits?

WITNESS.—That would mean cash on hand and money in the bank.

Q. Cash on call? A. Yes.

Q. 40% of the gross deposits, that means, that they might be called upon to pay out on check?

A. Does it say that? I would have to verify it by the books.

(Testimony of George F. Plamondon.)

Q. What does this mean, the cashier reported a reserve of 40% against deposit?

A. That would mean it had 40% cash and exchange against the deposits.

Q. What is that date?

A. March 9, 1918. That meant cash on hand against money on deposit.

Q. (By the COURT.) Is it customary to carry that high percentage of cash?

By WITNESS.—No, sir.

Q. What is the average. What is the legal requirement? A. Fifteen per cent.

Q. Your bank there was carrying 20, or in excess of 20% most of the time? A. Yes.

Q. Any of these meetings that you were present at so far as you know? A. So far as I know, no.

Q. Meeting of May 11, another regular meeting of the board, signed by Stewart only? A. Yes.

(Minutes read.)

Q. Meeting of June 8, 1918, reading as follows: (Read) Do [276] you remember that meeting?

A. I do not remember it definitely. I probably was there.

Q. Was that the fact? A. Indeed it was.

Q. You say if it is in these minutes, it is probably correct. A. I will say so, yes.

Mr. MILLER.—What do you mean now, that they were devoting their time, where?

Mr. GRINSTEAD.—It says there they were, giving their time virtually to the work in regard to Liberty Bonds.

(Testimony of George F. Plamondon.)

Mr. MILLER.—We will admit that.

WITNESS.—The bulk of that work in that county went through our bank.

(The minutes of July 13, 1918, were read.)

Q. Do you remember that meeting?

A. I cannot remember it definitely. I can say if Fred said I was there, I was there. I have that much confidence in him.

Q. You mean by Fred, Stewart, who signed the minutes? A. Yes.

Q. You have that much confidence in Mr. Stewart, if he said you were there and things such as these occurred, they did occur?

A. Yes, because he most probably called me in if they were discussing something about the reserve, he might have called me in and asked my opinion of this and that.

Q. Turning to another set of minutes dated August 10, 1918, I will read them.

(Minutes read.)

Mr. GRINSTEAD.—They are suing us here on Max Johnson, Seaside [277] Packing Company notes, and of December 28, 1917, and this is August 10, 1918, and they report that the balance of the Seaside Packing indebtedness has been settled.

Q. Another set of minutes signed only by Mr. Stewart, under date of September 14, 1918.

(Minutes read.)

Do you remember that meeting?

A. I cannot recall it; no, sir.

(Testimony of George F. Plamondon.)

Q. October 12, 1918,—

(Minutes read.)

These minutes are the ones that say that you were present. Do you remember that meeting?

A. I cannot remember of being there.

Q. Did you know about these Phillips loans in the bank?

A. I knew we had some Phillips paper; yes, sir. As I recall, several thousand dollars of Phillips paper.

Q. Some of which had been sold to the bank?

A. Well, now, that I could not say offhand.

Q. These minutes refer to them as having been sold to the Portland bank? The United States National, you do not remember the details of that?

A. I could not remember the details of it, no, sir, the minutes would show.

(The minutes of December 21, 1918, and the minutes of January 21, 1919, annual meeting, were read to the Court.)

Q. Those minutes are signed by George Plamondon, as secretary. Is that correct?

A. Yes, sir; it is.

Q. Mr. Knight was there, representing his own stock, and you were there representing your own?
[278] A. Yes.

Q. The minutes show who was present by stock representation and who was absent? A. Yes.

Q. I notice in this connection that these minutes of January 21, 1919, contain a copy of the report

(Testimony of George F. Plamondon.)

to the State Bank Commissioner, dated January 21, 1919, I will ask you whose handwriting that is in?

A. That is mine.

Q. I notice there that you reported to the Bank Commissioner who were the stockholders elected to be directors at that meeting, and who were elected to be officers of that meeting and you have also written in the name of the examining committee, Messrs. March, Baxter and Carrothers?

A. Yes.

Q. These names of the examining committee are in your handwriting? A. Yes.

Q. Were they the examining committee?

A. The records show that they were.

Q. Well, were they the examining committee?

A. Yes, sir.

Q. Don't you know who were the examining committee of the bank, outside of looking at that record. Don't you know if you had one?

A. I would not know without looking at the record, no.

Q. Do you know what the examining committee was supposed to do?

Mr. MILLER.—If there are minutes on it, let's have the minutes. [279]

Mr. GRINSTEAD.—I am asking what he knows about what they were supposed to do and we will try to find out?

Mr. MILLER.—He said he didn't know anything about it.

Q. Do you know what the examining committee

(Testimony of George F. Plamondon.)

is supposed to do,—is that the same as an auditing committee. A. No, I would not say so.

Q. Did you have two committees, an auditing committee and an examining committee?

A. I think not; just the examining committee.

Q. You wrote up this report here showing that March, Baxter and Carrothers were the examining committee?

A. The duty of the examining committee would be to examine the promissory notes, go through the loans.

Q. I notice here, in January, January 14, 1919, an adjourned meeting of the stockholders, present, Carrothers, Stewart, Plamondon and Knight; that is also signed by Mr. Carrothers and Mr. Stewart?

A. Yes.

Q. Now, I notice in this set of minutes here, under date of January 21, 1919, meeting of directors held on that date, present, Carrothers, March, Stewart; and Baxter and Wallace were absent.

(Minutes read.)

Is that Mr. March's signature? A. Yes.

Q. And Mr. Stewart's? A. Yes.

Q. And so that at this time, these minutes subscribed by these men show that the previous minutes had been gone over by the directors? [280]

A. Yes, sir.

(The minutes of May 26, 1919 were read.)

Q. It says the last published statement of May 12 was read. What does that refer to?

(Testimony of George F. Plamondon.)

A. That is a statement published according to law.

Q. That is required by law? A. Yes.

Q. You publish them whenever the Bank Commissioner calls for them?

A. Five times a year now, I think it was four times then.

Q. In reference to these minutes of May 26, 1919, is that those gentlemen's signatures? A. Yes.

Q. Now, I want to ask you about this next document bearing date May 26, 1919, if that is Mr. Stewart's signature? A. Yes, sir.

Q. That bears the same date of the meeting we were speaking of? Do you know anything about that piece of paper? A. I have never seen it.

Q. That is that guarantee?

A. So far as I know, it is the first time that I have seen it.

(Counsel here read the guarantee signed by Mr. Stewart under date of May 26, 1919, attached to the minutes.)

Q. The next set of minutes I find here, in this bunch, is October 21, 1919, a director's meeting signed by Stewart? A. Yes.

Mr. MILLER.—I made a statement to the Court this morning that I wish to correct. My statement is now that an officer of the bank cannot borrow from the bank except when authorized by vote of the Board of Directors, and when he is not [281] present at the meeting. That last part of the statement, I did not mention. I know they can borrow

(Testimony of George F. Plamondon.)

under the law when the directors authorize it, under the circumstances stated, but not otherwise, and in this case that was authorized by the Board of Directors.

Mr. GRINSTEAD.—In this particular case, Mr. March was present.

Mr. MILLER.—He should not have been. I am not questioning March, because he is officially responsible anyway.

(Minutes of January 30, 1920, and September 10, 1920, read.)

Mr. GRINSTEAD.—Now, we have a set of minutes here all duly executed, dated as December blank, 1920, but the minutes are duly executed and signed.

(Minutes read.)

They are signed by Mr. Carrothers, Mr. Stewart, Mr. Baxter and Mr. March. That is correct, isn't it? A. Yes,

Q. And here is attached a letter from George L. March? A. Yes.

Q. That is his signature? A. Yes.

(Letter read.)

Mr. MILLER.—That is in reference to the \$6,000 that was in the claim which we waived.

Mr. GRINSTEAD.—Yes.

Mr. MILLER.—That Stewart note. We claim \$6,000 on the Stewart note from you and this is the Stewart note that we waive.

(The minutes of February 11, 1920, and October 20, 1920, were read.) [282]

(Testimony of George F. Plamondon.)

Q. The minutes of October 20 were signed by Stewart, March, Baxter and Wallace? A. Yes.

Q. That is their signatures? A. Yes.

Q. Now, pasted in these minutes is this statement of February 13, 1920, which I showed you a while ago, and which you said was in Miss Waugh's handwriting. That is a statement that was presented to the stockholders? A. Yes.

Mr. GRINSTEAD.—I think, after a while, with everybody's permission, it would be well, if counsel would take this file and put it in chronological order.

Mr. MILLER.—You try it.

Mr. GRINSTEAD.—Am I authorized to do it?

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—I think you and I ought to take this exhibit and put it in a chronological order and eliminate the duplications.

Mr. MILLER.—I am willing to go over it and eliminate the things that are duplicates and cut out all of the immaterial matter.

Q. Date of February 14, 1920, set of minutes of directors meeting, present, Carrothers, March, Baxter, Stewart; absent, Wallace. Your salary was increased that meeting, I notice. Is that correct?

A. Yes.

Q. Were you present at that time?

A. I do not think I was present at the directors meeting. I think I was present at the stockholders meeting prior to [283] it.

(Testimony of George F. Plamondon.)

Mr. GRINSTEAD.—Here is a communication, an original copy, signed as an original, dated January 11, 1921, and addressed to Mr. Claude P. Hay, Bank Commissioner, which I will read.

(Said letter was read to the Court.)

Q. That is their signatures? A. Yes.

Q. January 3, 1921, is another one, signed by Stewart, Carrothers, Baxter, Wallace, is that correct? A. Yes, sir; that is their signatures.

Q. Here is another one, meeting of stockholders, January 11, 1921. I notice Mr. Knight and Mr. Plamondon are there. Is that correct?

A. Yes, sir.

Q. The next is a directors meeting of January 11, 1921, present, Carrothers, Baxter, Stewart and Wallace. Mr. Marsh being absent.

(Minutes read.)

That is correct as to the signatures?

A. Yes, sir.

Q. Here is another set of minutes, special meeting of the directors on Jan. 13, 1921, signed by Carrothers and Stewart, is that correct?

A. Yes, sir; that is their signatures.

Q. Now, we have here another set of minutes being the date set for the adjourned annual meeting of the stockholders, this being January 31, 1920. They decided they did not have a quorum and would meet on February 10, 1920, only four of them were present including Mr. Plamondon, Mr. [284] Stewart and Mr. Knight, and it is signed by Mr.

(Testimony of George F. Plamondon.)

Stewart and Mr. Plamondon. That is all part of this Exhibit 2-A.

Now, I think I can save a little time by passing over some that seem to have no particular bearing on the matter in hand. I am turning through the exhibit of minutes which bear the mark of Defendant's Exhibit 1-4, the last minutes in this book are under date of October 30, 1916. I want the record to show that I am working from the back of the book forward, and I want it to show there was a meeting of the Board of Directors on October 30, 1916; the cashier read to the directors the letter of the Bank Commissioner, September 30, making some suggestions in regard to over and short accounts and also referring to increased overdraft, particularly at the close of business September 12.

(Minutes of October 30, 1916 read.)

Q. That is Mr. Stewart's signature there?

A. Yes, sir.

Q. Those minutes are only signed by him?

A. Yes.

(The minutes of September 30, 1916, were read to the Court.)

Mr. MILLER.—These minutes are all in evidence and we admitted Stewart's signature.

Mr. GRINSTEAD.—I am going to read these minutes to the Court while Mr. Plamondon is on the stand, unless by the consent of counsel, we let the reading go until the end of the trial.

The COURT.—Proceed. [285]

(Testimony of George F. Plamondon.)

(The minutes of July 17, 1916, signed by Stewart were read.)

Q. That is his signature? A. Yes.

Q. Signed by Stewart? A. Yes.

Q. In connection with these minutes of February 23, 1916, signed, Carrothers, Catlin, Stewart, Wallace,—these are their signatures are they not?

A. Yes.

Q. In connection with the minutes of July, 17, 1916, there is a report there from the State Bank Commissioner criticizing the loans.

(Minutes read to the Court.)

Attached to these minutes is a copy of the report, to the bank examiner signed by Stewart, as cashier, and Catlin, and signed and sworn to before Moody, Deputy Bank Examiner, is that true? A. Yes.

Q. That is February, 1916?

A. February 23, 1916.

(Said certificate was read to the Court.)

Q. The next meeting prior to that day is the meeting of January 14, 1916, signed by Carrothers, Stewart, Catlin, and Wallace, is that their signature? A. Yes.

Q. The next meeting prior to that is January 11, 1916, signed by Carrothers, Stewart, Wallace, is that their signature? A. Yes.

Q. The next meeting prior to that is a stockholders meeting [286] of January 11, 1916, also election of the various directors and a letter dated August 24, 1915, from the State Bank Commissioner's office.

(Testimony of George F. Plamondon.)

(Said letter was read to the Court.)

Q. These minutes are signed by Carrothers, Catlin, Wallace and Stewart, that is correct, isn't it?

A. Yes.

Q. Meeting of October 9, 1915, signed by Catlin, Stewart and Wallace, that is their signature, isn't it?

A. Yes.

Q. The report of the State Deputy Commissioner made on the [287] 27th of September was gone over and various matters connected with the business of the bank discussed, etc. Attached to that is a copy of the Bank Examiner's report signed by Mr. Stewart and sworn to before Mr. Moody. Moody was the deputy State Bank Commissioner, wasn't he?

A. Yes.

(Said report read to the Court.)

Q. You remember the Cowlitz Bridge Company, do you not, Mr. Plamondon?

A. Yes.

The COURT.—There is nothing in that particular report or letter involved in this suit, is there?

Mr. DAVIS.—Not directly; no. It is on this Cowlitz Bridge Company matter, some assets which were later sold to other people.

Mr. MILLER.—There is nothing there to show any ratification or anything of that kind.

Mr. GRINSTEAD.—There is the possible future contention here that the board did not act as a board of this bank, and in that connection, I want to ask Mr. Plamondon if he is not related to the president of the bank, Mr. Carrothers?

A. I am.

Q. In what way?

A. Being his son-in-law.

(Testimony of George F. Plamondon.)

Mr. MILLER.—Did not act as a Board of Directors in what particular? They held their annual meetings and elected directors, but on these loans involved in this controversy, they never had any meeting at all in reference to them, unless it be that one of Mosier and Wallace.

Mr. GRINSTEAD.—I don't think there is a necessity of going [288] any further back than that.

Mr. DAVIS.—There is one other matter in connection with the meeting of January 12, 1915, and copy of the report to the State Bank Examiner, giving the list of officers, the names of directors, etc. There you see the members of the examining committee are James R. Catlin, James W. Wallace, John Ayers, signed by F. L. Stewart, cashier. That is his signature? A. Yes.

Q. It says George F. Plamondon and E. A. Knight were appointed assistant cashiers, that is when you took your office as assistant cashier the first time?

A. No, it seems to me before that.

Q. This was probably just the annual reappointment? A. I think so.

Q. And Mr. Catlin and Mr. Wallace and Mr. Ayers are appointed members of the examining committee for 1915?

A. That is what was reported to me. That is signed by Mr. Stewart.

Q. Fritz Kruze had some notes in there in 1920 and thereafter?

(Testimony of George F. Plamondon.)

A. If the records show it. It is pretty hard for me to remember.

Q. You remember Fritz Kruze had paper in there? A. Yes.

Q. You would know it in the course of your duties at the time? A. Yes.

Q. How about Frank Sheppard and Northwest Transportation Co., did you know when that paper was in the bank? A. Yes.

Q. You remember that? A. Yes. [289]

Q. Mr. Stewart had this paper in the bank from time to time, as you had yours? A. Yes, sir.

Q. Nearly all of the directors were borrowing money from the bank, isn't that generally true?

A. I believe so, though the record would have to show that.

Q. The Kelso Farm Company had loans in there? A. Yes.

Q. You remember and knew about that?

A. Yes.

Q. Also you knew about the Fisk dummy note? [290]

A. Yes, sir; I remember seeing it.

Q. Now, Mr. Plamondon, do you know whether the loans made to the officers or directors of the bank were authorized by the directors?

A. Do I know if they were?

Q. Do you recollect or do you know the practice or custom in the bank at that time in that respect?

A. Well, I could not say for sure. I know mine was an Elden Dunham's. I can remember one

(Testimony of George F. Plamondon.)

authorization of Mr. Stewart's for \$6,000. The record shows an authorization to Mr. Catlin and to Ayers.

Q. Let me ask you if it is not a fact that Stewart started borrowing in the bank at least as early as 1914 and that there was no resolution, and he borrowed almost monthly for a period of six years, running from a few hundred dollars to a thousand dollars. Do you not know about that?

A. Well I know he borrowed at frequent intervals, yes, sir.

Q. There was no authorization by the Board of Directors as to any of those loans?

A. You will have to consult the record.

Q. You do not recall any authorization at all only this \$6,000 loan?

A. That is the only one I can recall especially.

Q. That is the only one of Stewart's that you remember was authorized?

A. That is the only authorization I can remember explicitly; yes, sir.

Q. You began to borrow in that bank as of November 13, 1914, did you not?

A. I do not recall the date. [291]

Q. Turn to November 13, 1914, in the note register "D," \$700 note, that is in your handwriting, isn't it?

A. Yes, sir.

Q. It shows you borrowed on a note \$70 on that day? A. Yes.

Q. Is there any authorization of the Board of Directors for that loan?

(Testimony of George F. Plamondon.)

A. So far as I know, there is not.

Q. Well, you do not know that there is?

A. No, I could not say that I know that there was.

Q. Now, Mr. Plamondon, one other question before we go on to another book: do you know whether that is your first loan at that bank?

A. I honestly could not say offhand.

Q. You may have borrowed before that without authority? I will say to you candidly that I have not checked further back than 1914 yet, but I am going to. A. I could not say.

Q. Turning to September 25, 1915, testify as to what you find there?

A. There is \$125 note of that date.

Q. You borrowed that? A. Yes, sir.

Q. No authorization from the Board of Directors? A. So far as I know, none.

Q. November 3, 1915?

A. There is a note for \$130.

Q. Did you borrow that? A. Yes, sir.

Q. No authority from the Board of Directors?
[292]

Mr. DAVIS.—I suggest to him it might have been a renewal.

Q. That is, you can call my attention to renewals. Any time you see that in the record; if that was a renewal or an original note, say so.

A. We would have to go back to the other one to get that.

Q. All right, September 25, 1915.

(Testimony of George F. Plamondon.)

A. This is dated the day that the other one was cancelled.

Q. That shows one is a renewal of the other?

A. Yes.

Q. Now, going to the next note, was there any authorization for that renewal?

A. Not unless that authorization in the minutes was dated prior to that. I believe it was 1917.

Q. Yes, it was a good deal later than this, I think in 1918 as a matter of fact. Turning to November 26, 1915,— A. \$600.

Q. Did you borrow that? A. Yes.

Q. Any authorization by the Board of Directors?

A. So far as I know, none.

Q. All of these loans and all loans were matters of record in the bank from the dates that they bear, that I have called attention to? A. Yes.

Q. Taking up 1916 and turning to February 23?

A. \$130.

Q. Was that a renewal of the previous note?

A. Yes, that was a renewal. That was apparently a renewal of the other one, judging from the dates.

Q. Now, turning to 1916, any authorization for these? .[293] A. Not that I know of.

Q. May 25, 1916, two notes there, one for \$600 and one for \$130, were they made and were they authorized?

A. These are apparently renewals of the two of the previous date.

(Testimony of George F. Plamondon.)

Q. No authorization for the renewals that you know of? A. So far as I know, no.

Q. Turn to August 3, 1916?

A. That note is for \$105. It would seem as if that was a renewal, a balance of the \$130 which matured on that date.

A. Any authorization of that note?

A. Not so far as I know.

Q. Now turn to the note of November 22, 1916?

A. November 22, 1916, \$105.

Q. Apparently a renewal of the previous one.

A. Yes.

Q. That note was apparently a renewal of the last one, and was there any authorization of that note? A. Not so far as I know.

Q. Another February 1, 1917, \$100.

A. \$100. February 1st.

Q. Renewal? A. Yes.

Q. Was there any authorization of that note, whether it was a renewal or otherwise?

A. Not so far as I know now.

Q. February 15, 1917, \$600?

A. February 15, \$600.

Q. Any authorization?

A. So far as I know, none. [294]

Q. March 10, that is probably a renewal?

A. I know it is a renewal, because it was endorsed by Mr. Stewart. It was given to Mr. Stewart in payment of some three shares of stock, bank stock, which he sold me. In this renewal which is endorsed

(Testimony of George F. Plamondon.)

by him, it had not been authorized prior to that according to the records.

Q. March 1, 1917, \$95?

A. That \$95 was out of that \$100 that is retired, apparently a little reduction on the renewal, the same one.

Q. No authorization for that note either?

A. So far as I know, none, unless that authorization was dated prior to that time.

Q. Unless that \$2,000 authorization which is found in the minutes? A. Yes.

Q. I will say, if you agree with me, to save time, that this \$95 note may be conceded to be a renewal, if you say that it is?

A. Probably a renewal of that similar one.

Q. No authorization, just the same as before?

A. Just the same as before.

Q. July 13, 1917, another \$95 note?

A. \$95. That is a renewal. That is the date the other note matured.

Q. Similar lack of authorization? A. Yes, sir.

Q. October 13, 1917. A. \$600.

Q. Same condition as to the authorization?

A. Yes, sir; and renewal of the other one. [295]

Mr. GRINSTEAD.—Counsel suggests that this is taking a great deal of time. I will say that I am endeavoring to prove that each and all the officers, and directors of that bank borrowed as a matter of habit or custom during the entire period we have traced, without authorization as required by the law that counsel speaks of and I want to show that

(Testimony of George F. Plamondon.)

was the condition and custom in the bank. If he wants to concede that as to these numerous loans, we can save time.

Mr. MILLER.—Whatever the record shows.

Mr. GRINSTEAD.—I have got to show what the record shows.

Mr. MILLER.—But most of these loans were prior to the time this law was passed, and I do not think it makes any difference.

Mr. GRINSTEAD.—If you do not care to stipulate, we can go ahead along this line.

Q. November 20, 1917, \$295 and \$95. A. \$295.

Q. November 20 is one of \$95 and a note of \$295?

A. \$95.

Q. That is probably a renewal also?

A. The same.

Q. The same status as to authorization?

A. Yes.

Q. Only one authorization ever occurred, and unless that covers it, there is no authorization.

A. No. That is all I recall.

Mr. MILLER.—That is all of the notes?

Q. There is another one of these \$95 loans February 26. A. \$95.

Q. Same status? [296] A. Yes.

Q. That loan was made but there is no authorization? A. Yes.

Mr. GRINSTEAD.—That is as far as we have checked on Mr. Plamondon's loans. I will turn for a moment to Mr. Stewart's. I will ask you to turn for a moment to June 20, 1914, loans to Stewart,

(Testimony of George F. Plamondon.)

and in this matter I will want the record to show the dates that the record shows the payment or settling or satisfaction of the several notes for the reason that there have been records submitted to the surety company in which Mr. Carrothers has sworn, or signed a certificate that he did not owe the bank any money,—that Stewart did not owe the bank any money, at the date of the certificate. We have the certificates and they will go in evidence later, in the case, over Mr. Carrothers' signature.

Q. July 20, there was a loan of \$1,000 Mr. Stewart? A. Yes.

Q. What date does that show as being paid?

A. July 22, 1914.

Q. Shows paid two days later? A. Yes.

Q. Now, July 22, there is a loan of \$500, when does that show paid?

A. That shows paid August 11th.

Q. That is \$500? A. \$500.

Q. August 11, note of \$1,200. Of course, when you say that shows paid, you verify what I say in my question, you find the record of the note and you give me the date of [297] payment?

A. Yes, that is \$1,200.

Q. When was that paid?

A. Shows cancelled August 17.

Q. August 17,— A. Yes, 1914.

Mr. GRINSTED.—I may have to modify my statement as to his certificate that there was no in-

(Testimony of George F. Plamondon.)

debtedness on all of these dates. I am not sure of that now. I want to go ahead here.

Q. October 8, 1914, a loan of \$800 to Mr. Stewart?

A. October 8, \$800, marked paid as of October 14, 1914.

Q. November 19, 1914, \$300?

A. \$300, marked paid as of November 27, 1914.

Q. Now, as to 1915,—do you know of any authorization by the directors of any of those loans?

A. No, sir.

Q. \$600, March 24, 1919?

A. March 24, \$600 cancelled as of April 7, 1915.

Here the Court adjourned until ten o'clock the following morning. [298]

November 1, 1922.

Trial continued as follows:

GEORGE F. PLAMONDON, being recalled, continued his testimony as follows:

Cross-examination (Continued).

(By Mr. GRINSTEAD.)

Q. Mr. Plamondon, on yesterday we were examining into the records showing the course of borrowing by the officers, directors and employees of the bank. Let me ask you if it is not a fact that since adjournment yesterday, you and Mr. Davis have jointly gone over the note register of the bank from,—what date was that, when did you start off?

A. 1910.

Mr. DAVIS.—September 1, 1910, as to Stewart, and as to the others, since 1914.

(Testimony of George F. Plamondon.)

Q. And you have agreed as to what your testimony would be if taken through the record?

A. Yes.

Q. And a memorandum has been drawn up, is that correct? A. Yes.

Q. And that memorandum is this group of sheets which I hold in my hand? A. Yes.

Q. Showing the name of the borrower, the date the note came into the bank and the date of payment in each case, as disclosed by the Note Register of the Bank, is that correct? [299] A. Yes.

Q. And the amount the note figures?

A. Yes, shows the date of the note and the amount.

Q. That is the date of the entry in the bank?

A. Yes.

Q. Not necessarily the date of the note?

A. Just the date of entry into the bank.

Q. Just state whose accounts you covered in that search.

A. F. L. Stewart, G. F. Plamondon, L. N. Plamondon, J. M. Ayers Lumber Company.

Q. Just a moment there, that is a Company operated and owned by J. M. Ayers, director, isn't it?

A. Yes.

Q. And then J. M. Ayers himself has a record of individual borrowing outside of the Lumber Company? A. Yes.

Q. And on the other side of the sheet (indicating).

A. Pat Baxter.

Q. Pat Baxter is a director?

(Testimony of George F. Plamondon.)

A. Yes. J. R. Catlin, George L. Marsh, James Wallace, Kelso Farm Company.

Mr. GRINSTEAD.—Now, I propose instead of having this witness go through the books at this time, to simply identify these sheets and let them go in, instead of examining the figures, if it is agreeable to you.

Mr. MILLER.—Sure.

Mr. GRINSTEAD.—I would like to have this marked as our exhibit.

The COURT.—Is this a statement of the entire accounts of these parties or a partial statement?
[300]

Mr. GRINSTEAD.—The note register of the bank is a continuous affair from one item to another down through the years. They have gone back to 1910 and did not go back of that. And from that time they have run the note register to see where F. L. Stewart borrowed on notes, and the same way with each of the others, and abstracted the record on to sheets of paper, showing the amounts borrowed by the directors.

The COURT.—The Kelso Farm Company was not a director, was it?

Mr. GRINSTEAD.—The Kelso Farm was not a director, but Mr. Stewart was the owner of that company.

The COURT.—This is simply an abstract of the note register as affecting the parties concerned here.

Mr. GRINSTEAD.—Counsel has called attention to the statute about the borrowing and I want

(Testimony of George F. Plamondon.)

to say this, in the record, so as not to be misleading anyone: For instance we will see Mr. Ayers made notes which are listed in there, which were for moneys borrowed out of the bank at a time when he was not a director. That is to complete the list from 1910 down to whenever they stopped doing business, and I will follow that with another exhibit which will show the dates he was a director.

The COURT.—The abstract prepared by the witness will be received in evidence.

Thereupon said abstract was received in evidence and marked as Defendant's Exhibit 19-A.

Q. Now I hold in my hand here, a record which is my own work, rather than the witness', which I prepared on the other [301] side of the table while they were working on their records. I am willing to be sworn and I am willing to make this as a statement for the purpose of saving time, or I will bring the records in to have the witness show the interest.

Mr. MILLER.—What is it?

Mr. GRINSTEAD.—It is a statement that shows a summary of the minutes from 1909 at the annual meeting where they elected directors, showing what directors were elected for each year from 1909 to 1921. I have that placed in a summarization on the front page, which shows as to each one of these men that the man was a director from such a date to such a date and such and such years. We prepared this thinking it would save a lot of work.

(Testimony of George F. Plamondon.)

Mr. MILLER.—We have no objection to that being admitted.

Mr. GRINSTEAD.—It also shows the period of time that L. M. Plamondon was in the bank as assistant cashier, as derived from the records. It also shows the time that George F. Plamondon was in the bank, as shown by the records, first as a teller and later as assistant cashier. Neither of the Plamondons was a director, according to the record. It also shows, from a search of the minutes, all the loans that were ever authorized by a meeting of the directors.

The COURT.—It may be admitted.

Thereupon said' summarization of minutes relating to election of directors, was received in evidence and marked as Defendant's Exhibit 20-A.

Mr. MILLER.—I want to ask one question, according to your [302] statement there, was Ayers a director of the bank or an officer of the bank at the time he borrowed money from the bank.

Mr. GRINSTEAD.—There is just that much filling in to be done when we get to the argument, to show in argument whether Mr. Ayers borrowed at any time, when he was a director. Mr. Ayers was a director from August 1912 to the end of 1916.

Mr. MILLER.—Then this loan to the J. M. Ayers Lumber Company was after he had gone out?

Mr. GRINSTEAD.—It would appear so there. There appears to be no borrowing by the Ayers Lum-

(Testimony of George F. Plamondon.)

ber Company during the time that Mr. Ayers was a director.

Mr. MILLER.—Or an officer of the bank.

Mr. GRINSTEAD.—That is all a matter we intended to take up in argument, but J. M. Ayers himself was borrowing,—Ayers started in 1912, but Ayers personally only made some 15 or 20 loans during the time he was director.

Mr. MILLER.—That is a matter we can work out later, your Honor.

Mr. GRINSTEAD.—There are 18 notes that Mr. Ayers appeared to have borrowed from the bank, and there is no record of any authorization, and these were all borrowed during the time he was a director of the bank.

Q. Mr. Plamondon, who was Harry C. Dunham?

A. Harry C. Dunham was for many years a business man in Kelso, a druggist. He later was County Treasurer for, I believe, two terms. At one time Mr. Stewart had Mr. Dunham employed as an accountant for a period of several months at the Kelso State Bank. [303]

Q. Do you know his signature? A. Yes.

Q. Showing you a statement signed by Harry C. Dunham, auditor, on the stationery of the Kelso State Bank, dated December 10, 1916, is that Mr. Dunham's signature? A. Yes, sir.

Mr. GRINSTEAD.—I would like to substitute a copy and offer it in evidence.

Mr. MILLER.—No objection.

(Testimony of George F. Plamondon.)

Said copy of statement of Harry C. Dunham, December 10, 1915, was received in evidence and marked as Defendant's Exhibit 21-A.

Redirect Examination.

(By Mr. MILLER.)

Q. Mr. Plamondon, in going over these notes, or rather the loans shown in Exhibit 19-A, were many of these renewals as far as you know?

A. Why, it would seem as though quite a good many of them were renewals. For instance the maturity of one would be the date of the new note, in quite a good many cases.

Q. You did not know anything about those personally, did you? A. Not a good deal; no, sir.

Q. Outside of your own loans? A. No, sir.

Q. There might have been verbal authorization by the board of directors, so far as you know?

[304] A. I do not know.

Q. You do not know anything about that?

A. I would not know either way; no, sir.

Q. Stewart practically dominated the bank, didn't he?

A. Well, that would be my impression; yes, sir.

Q. And during the last three or four or five years there were a number of loans authorized as you read from the minutes yesterday? A. Yes.

Q. And there might have been authorizations as to the others so far as you know, not recorded in the minutes?

A. No, sir; I could not say either way.

(Testimony of George F. Plamondon.)

Mr. GRINSTEAD.—I would rather you would not lead him.

Mr. MILLER.—This is a matter you brought out yourself.

Mr. GRINSTEAD.—This is not a matter where you can lead the witness.

Q. You stated yesterday you gave a note there for \$600 for your stock, didn't you?

A. I gave a note to Mr. Stewart and he turned it into the bank.

Q. You gave that note to Stewart for what purpose? A. He sold me shares of bank stock.

Q. And what did he do with the note?

A. He turned it in the bank.

Q. He turned it into the bank. A. Yes.

Q. State whether or not he paid the interest on the note or what became of that note?

A. The bank carried the note for quite a long period. The record would show the time, and Mr. Stewart himself paid [305] the interest on that note to the bank up until a period of six or eight months, six, eight or ten months prior to the time I paid the note myself in cash. When I paid it, I paid somewhere around \$630 or \$640, that is all the interest I paid on the note myself. He paid it aside from that.

Q. The loans you had from the bank, whom did you get them from? A. From Stewart.

Q. From Stewart? A. Yes.

Q. You have testified that you did not know the circumstances of the other loans at all.

A. I did not know.

(Testimony of George F. Plamondon.)

Q. Lew Plamondon was simply an assistant cashier? A. Yes.

Q. When did he cease to be connected with the bank?

A. I do not remember the date. That exhibit, I believe, would show.

Q. About how long ago was that?

A. It must have been around ten years.

Q. Now counsel read and you verified the signatures of Mr. Stewart yesterday, to a number of meetings of the Board of Directors in which statements were made by Mr. Stewart as to the condition of the bank.

Mr. GRINSTEAD.—I object to that as misleading.

The COURT.—Objection overruled.

Q. You heard read those statements of Stewart's from time to time?

A. Well, I don't know hardly how to answer that because I [306] recall some of those meetings as I testified yesterday, but a good many of them I could not recall.

Q. Stewart was continually stating to the directors the condition of the bank, was he?

A. Well, that would be hard for me to say, I was not a director.

Q. Did you and your brother make an investigation of the assets of the bank just before it closed?

A. Yes.

Q. Your brother is a banker now at Woodland?

A. Yes.

(Testimony of George F. Plamondon.)

Q. Been in the bank there for how long?

A. About around ten years.

Q. The bank at Kelso closed on the 17th of March. How long before that did you and your brother go over the assets of the bank to find out its real condition?

A. I would say it must have been around ten or twelve,—I cannot remember the date, it must have been around the 10th or the 12th.

Q. The 10th or the 12th of March? A. Yes.

Q. That would be four or five days before the bank was closed?

A. Yes, four or five days or a week, something like that.

Q. And what did you find as to the condition of the bank?

Mr. GRINSTEAD.—I think that is immaterial and is not rebuttal.

The COURT.—Overruled.

Mr. MILLER.—I do not think it is material, only we want to show the condition of the bank. [307]

Mr. GRINSTEAD.—Under what issue?

Mr. MILLER.—If the bank, as counsel has contended, was hopelessly insolvent, and Stewart was taking money from it and putting it into his private enterprises,—

Mr. GRINSTEAD.—I am not contending that Mr. Stewart took any from the bank.

Mr. MILLER.—You say he loaned to himself. He could not have loaned it to himself very well if it was hopelessly insolvent.

(Testimony of George F. Plamondon.)

Mr. GRINSTEAD.—I have not said that either.

Mr. MILLER.—I would like to have this witness testify,—

The COURT.—There is nothing before the Court, go ahead.

Q. What did you find, how much paper did you find that you considered worthless?

A. I can only give you the figures roughly. I cannot remember just exactly what they were, but as I recall, we found,—that is we were basing it on our best judgment,—we found in the neighborhood of \$100,000 we considered uncollectable.

Q. Uncollectable paper? A. Yes.

Q. And that paper had been in the bank for how long, for some considerable time?

Mr. GRINSTEAD.—Of course all of this is going in over our objection and I ask an exception.

The COURT.—Objection overruled, exception allowed.

Q. Did you say it had been there for some time?

A. Yes, a lot of it had been there for considerable time.

(Witness excused.) [308]

Testimony of Judge H. E. McKenney, for Plaintiff.

Judge H. E. McKENNEY, a witness called by the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Your name is H. E. McKenney? A. Yes.

Q. You live at Kelso? A. I do.

(Testimony of Judge H. E. McKenney.)

Q. How long have you lived at Kelso?

A. Well, most of the time for 23 years.

Q. You were on the bench down there for a short time? A. Yes.

Q. You are a practicing attorney there?

A. Yes.

Q. I believe you have quit practicing the last couple of days?

A. My retirement commenced to-day.

Q. Were you acquainted with Mr. Stewart?

A. I have been acquainted with Mr. Stewart since about 1900.

Q. I wish you would state to the Court how intimately you were acquainted with him.

A. I was very intimate with him for a number of years, in fact I had an interest in the bank and was president of the bank from 1900 to 1906 and he was cashier during that time.

Q. You had no connection with the bank at the time it failed?

A. No, not since the Spring of 1906.

Q. Not even a stockholder? [309] A. No.

Q. But, you have been in close touch with Stewart and his management of the bank since then?

A. I have, yes.

Q. I wish you would state to the Court to what extent Stewart claimed and did actually dominate the affairs of the bank.

Mr. GRINSTEAD.—May I ask the witness a question?

Mr. MILLER.—Yes.

(Testimony of Judge H. E. McKenney.)

Mr. GRINSTEAD.—You were attorney for the bank during the time?

Mr. McKENNEY.—Yes, most of the time during that time I have been under a retainer fee. I had nothing to do with the bank, only when Mr. Stewart asked me about things.

Q. You were Mr. Stewart's personal attorney also? A. Most of the time, yes.

Mr. GRINSTEAD.—I think that question contemplates conversation between this witness and Mr. Stewart in the relation of attorney and client and I renew the objections on the grounds I urged the other day.

The COURT.—I do not understand to what extent Mr. Stewart dominated,—

Mr. MILLER.—I do not care about that. To what extent did he, from your acquaintance and observation, to what extent did he dominate the bank?

Mr. GRINSTEAD.—I think that nearly calls for a conclusion of this witness of Mr. Stewart's moral influence or whatever it was over other people.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception, please. [310]

A. Well, he actually did dominate them because he was of that character and especially during the later years, he would not brook interference from anybody. You had to go his way or he was simply peeved about it and would not do business at all.

Q. Do you know whether Stewart was engaged in various outside transactions? A. Always.

(Testimony of Judge H. E. McKenney.)

Q. And during the last two or three years was he engaged in outside business transactions?

A. Yes, he was.

Q. To what extent?

A. Well, he was engaged in everything that he thought he could make a dollar out of and he was quite a plunger; wherever he thought there was anything he could make a few dollars out of, he was always into it if he could get in.

Q. You are the present administrator of his estate? A. Yes.

Q. I wish you would state to the Court about the financial standing of Stewart at the time of the bank failure and the time he disappeared.

A. Well, there have been something like \$72,000 in claims presented to me against the estate.

Mr. GRINSTEAD.—I object to the question as entirely immaterial as to the condition of his estate.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception.

Q. \$72,000 of claims?

A. \$72,000 of claims and then there were several mortgage [311] claims amounting to around \$50,000 that were not presented against it.

Q. What would you estimate from the information you have would be about the amount of his indebtedness at the time of the bank failure?

A. That would depend on whether you would consider these amounts he took from other people's accounts, and if you figured those in, I would say

(Testimony of Judge H. E. McKenney.)

it would amount to \$200,000, mortgage debts and all, and everything.

Q. Were there any assets of any consequence?

A. Of course there was one mortgage of \$38,000 on some timber down in Wahkiakum County. If I, as administrator had money to pay this mortgage off, that undoubtedly would have been worth more than that amount, but the actual estate, I think, was something like \$1,500, and then there was some farm machinery that does not amount to much and then there was one insurance policy for \$5,000 which I have not been able to collect yet.

Q. Was that payable to the estate?

A. That was payable to the estate.

Q. Leaving out the insurance policy, just simply to show his financial worth before his death,—

A. \$2,000 would cover everything outside of that, that I have been able to collect on.

Q. Outside of what?

A. Outside of the insurance policy.

Q. As against that there was in the neighborhood of \$200,000 liabilities? A. Yes.

Q. Now, to your knowledge of the situation over there, [312] what relation did Stewart's private affairs have with the bank, as to whether it was all worked together or not?

A. Well, that might be objectionable to say it, but he worked it all together.

Q. Well, did he?

A. Absolutely. He considered the bank as his.

(Testimony of Judge H. E. McKenney.)

I have heard him state that at times, "I am the bank."

Q. You have heard him say that?

A. I have heard him say that.

Q. Do you know about the farm he had down below Kelso? A. Yes.

Q. He had a trade name, I believe it is conceded here. What was that trade name?

A. It was not a trade name originally, it was a corporation organized by him and his friends and he bought all the rest of them out and then afterwards dissolved the corporation.

Q. That covered a certain farm, did it? A. Yes.

Q. Were there any encumbrances upon that farm?

A. There was a \$40,000 mortgage and then there was the dyking assessment. The total amount on that farm amounted to something like \$118,000.

Q. \$118,000?

A. \$118,000, dyke charges, mortgage, interest, everything.

Q. Did you disincorporate the corporation?

A. Mr. Fisk did, my partner.

Q. And then he owned the interest, the equity in that farm?

A. All of it, he was the sole stockholder at that time.

Q. Was that what he called the Farm Loan Company or the Kelso [313] Farm Company?

A. The Kelso Farm Company.

Q. Did that property have any value above the encumbrance against it?

(Testimony of Judge H. E. McKenney.)

A. Well, I sold it as administrator, and got a bid of \$200.

Q. Practically had no value whatever above encumbrance?

A. No. Outside of the Long Bell people coming in there, I never could have got five cents.

Q. Well, at the time of his disappearance?

A. It was not worth anything.

Q. Do you know what the Fisk deal was, that Stewart had with Fisk? A. Yes.

Q. Were you present at any time at any conversation with Stewart about that? A. Yes.

Q. I wish you would tell the Court what you know about that.

Mr. GRINSTEAD.—We renew the original objection to this conversation.

Q. Were you acting in any manner, at that time, for Mr. Stewart, when this conversation occurred?

A. No.

The COURT.—Objection overruled.

A. Mr. Stewart and myself and some other people had bought what we called the Shillapoo project down in Clarke County, and Mr. Fisk wanted to go into it with them and take an interest in it, but he had no money and we all agreed that Mr. Fisk should have a one-sixth interest in that project provided he could raise the money and Mr. Stewart agreed he would furnish,— [314]

Mr. GRINSTEAD.—That agreement was reduced to writing and is in evidence here so that there is no necessity of going into that.

(Testimony of Judge H. E. McKenney.)

WITNESS.—I did not know that.

Q. You wrote the agreement or did Fisk write it? A. I do not remember at this time.

Q. After that agreement which is in evidence, was made, did you hear any conversations between Stewart and Fisk? A. I did.

Q. What were they?

A. Stewart was insisting that Mr. Fisk come to the bank and give his note for that amount of money, which Fisk refused to do, and they had practically a quarrel over it, and Mr. Stewart went away very angry about it, and he came back and renewed it afterwards. Fisk finally told him he would give the note if he would embody in that note all the conditions that were in the contract, but it never was carried out. He never gave any note up to the time Stewart disappeared.

Q. Did you know Phillips, H. D. Phillips?

A. Yes. [315]

Q. Did he live around Kelso there?

A. He lived out in what we called the Shanghai country, five or six miles from Kelso.

Q. That was in that county? A. Yes.

Q. What aged man was he?

A. Around 30, I suppose.

Q. A young man? A. A young man.

Q. Did he have any property worth anything at all?

A. Oh, he had an interest in a little place out there, but I do not remember what the interest was,—it did not amount to anything.

(Testimony of Judge H. E. McKenney.)

Q. Had no other standing? A. No.

Q. Had no financial standing? A. No.

Cross-examination.

(By Mr. GRINSTEAD.)

Q. Judge McKenney, you have testified for counsel, that Stewart dominated the bank. You do not wish to be understood that he had control of the bank for voting purposes, do you?

A. Well, no; I do not think he had sufficient stock to absolutely control it, as I understood.

Mr. MILLER.—Yes, he had a majority of the stock.

Mr. GRINSTEAD.—Just a moment, I will state to you now what the record shows. The evidence shows he voted 80 shares [316] out of 250, at every meeting until January 1920, when he voted 119-2/3 shares. I have the records right here before me. The records are in evidence and they show he did not own half of the stock on January, 1919.

WITNESS.—Just a little short of control, was my understanding.

Q. Just a little short of control in 1920 and 1921, and just prior to that date he had 80 shares.

A. Yes.

Q. It is obvious if the stockholders had been so decided they could have removed him at any time?

A. I suppose that could have been done, yes.

Q. They could have elected a Board of Directors to do what they wanted with him?

(Testimony of Judge H. E. McKenney.)

A. Undoubtedly with him.

Q. So that all you mean by that testimony is that he had a personality that was insisting on forcing his idea as to the bank upon his associates, and he succeeded in doing that?

A. Yes, that is it exactly. He dominated the situation.

Q. And Mr. Carothers and these other gentlemen acquiesced in what he was doing?

A. Well, they would not be there to acquiesce very much.

Q. You are attorney for Mr. Carothers, are you not? A. Yes.

Q. You came up here with him in this trial?

A. Yes, I did.

Q. For the purpose of hearing his testimony?

A. No, sir.

Q. Mr. Carothers is being sued in this same matter? A. Yes, I believe so. [317]

Q. And he is interested in this whole matter here?

A. I presume he is.

Q. You said that Mr. Stewart was somewhat of a plunger, and then you subsequently said you were in an enterprise, interested in some of his enterprises? A. Yes.

Q. Principally the one connected with the Shillapoo project? A. Yes.

Q. Are you all plungers down there?

A. Well, I do not know. I do not believe some of the rest of us were plungers to the extent that he was.

(Testimony of Judge H. E. McKenney.)

Q. You do not believe you are as bad as Mr. Stewart, as a plunger?

A. Well, I never lost any money plunging.

Q. I understand from Judge Miller, you are more successful as a plunger or otherwise, than Mr. Stewart turned out to be?

A. I do not know what Miller has told you.

Q. Now, you have mentioned the Shillapoo deal, tell us who were the other gentlemen in the deal,—I think my friend Judge Miller was one of them?

A. Yes.

Q. And his law partner, Mr. Wilkinson.

A. Yes.

Q. And your law partner, Mr. Fisk? A. Yes.

Q. And Mr. Crouch, the druggist at Kelso?

A. Yes.

Q. And Mr. Stewart?

A. I guess you have named them all. [318]

Q. Six of you gentlemen.

The COURT.—What was that in?

Mr. GRINSTEAD.—In the Shillapoo land deal they are talking about here.

Q. Was that a deal in which considerable money was lost by Stewart?

A. Well, I do not know, I presume so. He was not able to carry out his contract and it has been cancelled.

Q. He paid in a great deal of money in the deal? A. Oh, he put in some money, yes.

Q. A good many thousand dollars?

A. For himself and Mr. Fisk about \$12,000.

(Testimony of Judge H. E. McKenney.)

Q. And that was lost? A. Yes.

Q. And you have some money in that deal?

A. Yes.

Q. Did you figure when you went in, it was a loss? A. No, sir.

Q. Did any of the other gentlemen who were in figure it was a loss? A. No.

Q. Going to be a loss?

A. No, I do not know they did. It looked very bright. I could not censor anybody on that deal.

Q. When you testified here relative to Mr. Stewart taking over the Kelso farm and things of that sort, isn't it a fact, as a matter of fact, after-sight rather than foresight on your part; in other words what you have testified to is based on the history of the deal rather than the judgment of yourself and the other men at the [319] time the various things occurred.

A. I do not just get you.

Q. You were acting as Mr. Stewart's attorney during all these years there?

A. Why, most of the time when he wanted to take my advice he did, and when he did not, he did not.

Q. Mr. Stewart undoubtedly talked with you a good many times about his various ventures?

A. He talked with me about some of them and some he never mentioned.

Q. Some of them he did not? A. No.

Q. Did you have a good knowledge of these various investments of his at the time they occurred, as

(Testimony of Judge H. E. McKenney.)

you have now? A. Well, pretty much, yes.

Q. Pretty much? A. Yes.

Q. You discussed with him all of his ventures?

A. No, sir; I did not. I was called in on some of them and some he would not. Sometimes he would call me in and sometimes he did not.

Q. You were friends and associates, using your best judgment? A. Yes, that is right.

Q. And very largely worked together during those years? A. Yes.

Q. So that your minds were not so far apart as to the different enterprises in which he was interested?

A. We wandered apart in the last three or four years. I could not follow him.

Q. You were bearing the market and he bulled the market? [320] A. Yes.

Q. Previous to that time, you and he were generally bulls on the market?

A. There were things around there that we could not help but see there was some money in and we tried to take advantage of the situation.

Q. Judge McKenney, seriously speaking, Mr. Stewart had a sort of idiosyncrasy as a banker that it was up to his bank to carry the load of industry in the community and help develop the community?

A. You are right about that.

Q. And in your judgment he overdid that a little bit?

A. His principal fault as a banker was that he never would take a loss under any circumstances.

(Testimony of Judge H. E. McKenney.)

Instead of charging it off, he would put more money in it.

Q. When he got in on some of these loans for the bank, he would go ahead and keep on trying to carry them and try to work them out?

A. Against the advice of everybody.

Q. Against the advice of everybody? A. Yes.

Q. And when they criticised him, he said, "I made the deal and I will be responsible for it"?

A. Yes.

Q. Acting all the time in the utmost good faith, and endeavoring to pull everything through, isn't that right?

A. I thought that at the time, but since I am familiar with what he was actually worth and what he said he was worth, I think he could not have been acting in good faith.

Q. Mr. Stewart actually expended in your judgment, a good [321] deal of money on that farm, that Kelso farm? A. Oh, he did, of course.

Q. He never considered at any time he had no equity or only \$200 equity in the Kelso farm?

A. I do not think he did, no.

Q. And if the bank had continued for a couple of years more, and he had succeeded in weathering the storm there in 1921, the chances are he would have gotten more out of it than you did as administrator?

A. Oh, he might have. Still, I think his ideas were way in advance of what it was actually worth at any time.

Q. In other words, if he thought he was worth

(Testimony of Judge H. E. McKenney.)

\$100,000 to \$200,000, he might have been only worth \$50,000?

A. Well, he was not really worth anything.

Q. You doubt whether he was worth anything?

A. Yes. Taking all these things and the condition he was in, of course if he had had the money to carry out these things and made that farm pay for his mortgages, why he would have been worth something, but his insolvency affected the bank's insolvency.

Q. Now, you testified to a conversation between your partner, Tom Fisk, and Mr. Stewart in your presence, in which you stated that Fisk agreed to give a note if all the conditions of his obligation and in his previous arrangement with Stewart were embodied therein? A. Yes.

Q. Have you any method of fixing the time of that conversation?

A. Well, there were several conversations about that. In fact he was after Fisk for probably a month before he went away, trying to get him to sign the note. First he [322] sent a note over there; I saw the note, just a straight promissory note for him to pay the bank.

The COURT.—What do you mean by before he went away?

A. Before he went to Portland. I will say to Judge, I think he is dead.

Q. That was just a month or so before the bank failed? A. Yes.

Q. That is about as close as you could fix it?

(Testimony of Judge H. E. McKenney.)

A. I do not know, it was right along then, and he was after [323] Mr. Fisk to get him to sign that note and insisted that he sign it.

Redirect Examination.

(By Mr. MILLER.)

Q. Counsel has asked you if Mr. Stewart told you about all of his enterprises. Did he tell you anything about his association with the Northwest Transportation Company?

A. He never mentioned it to me in the world.

Q. Or with Shepherd? A. No.

Q. You never knew anything about that?

A. I never knew anything about it, only just from reports from the outside.

Q. You did not know he was in the steamboat business? A. No.

(Witness excused.) [324]

Testimony of Frank Shepard, for Plaintiff.

FRANK SHEPARD, a witness called by the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Your name is Frank Shepard? A. Yes.

Q. You live at Portland? A. Yes.

Q. Did you know F. L. Stewart of Kelso?

A. Yes.

Q. When did you first become acquainted with Mr. Stewart as far as this matter was concerned?

A. The first of March, 1921.

(Testimony of Frank Shepard.)

Q. You were then engaged in what business?

Mr. GRINSTEAD.—You mean 1921 or 1920?

A. I guess 1920, I was in the autobus transportation business.

Q. Now, did you have any dealings with Stewart?

A. Not until the first of March.

Q. What was that dealing, what was that deal in March?

A. Well, I bought a half-interest in the steamer "Olympian" with him.

Q. Was that in the name of any corporation?

A. Northwest Transportation Company.

Q. What did you agree to give for that?

A. \$15,000.

Q. What did you give him?

A. I gave him \$1000 cash and various notes, a thousand dollars [325] apiece, fourteen.

Q. And who were you dealing with at that time?

A. Stewart.

Q. Were you dealing with the bank in any manner? A. Not at all.

Q. Just with Stewart? A. Yes.

Q. Did you operate that boat?

A. No. Well, we tried to operate it two trips, but it would not work.

Q. Never made any money out of it? A. No.

Q. What became of the boat as far as you know?

A. Well, it was afterwards sold to the bank for back taxes.

Q. That was after the receivership? A. Yes.

Q. After the failure of the bank? A. Yes.

(Testimony of Frank Shepard.)

Q. Now, did you ever give any other notes,—I mean did you ever have any business connections with the bank of any character?

A. Not a dollar.

Q. If there are any other notes, were they simply renewals of those original notes?

A. Those notes were renewed as they went along, and then afterwards made out to the bank.

Q. I wish you would tell how that happened.

A. Well, those notes came up,—well I will have to state the first part of it.

Q. Yes, all right. [326]

A. When the deal was made I told Stewart I did not have money to handle it, and he said, “Well, if you do not have the money, I will take care of the notes as they come due,” and as I recollect, he put either \$5,000 or \$6,000 in the United States National Bank.

Q. You mean that many notes? A. Yes.

Mr. GRINSTEAD.—He means he discounted the notes, Stewart rediscounted the notes in the Kelso Bank and then the Kelso Bank rediscounted them in the United States National?

A. I do not know how that was done. It came up through the United States National Bank for collection.

Q. Some of these notes you had given?

A. Yes, and they went so far as to be protested, and Stewart would send me \$1,000 check to deposit in my bank and I would pay the interest out of my

(Testimony of Frank Shepard.)

own money to pay these notes off with, and then he would send me a renewal.

Q. And then he would send you a renewal?

A. Yes.

Q. He would pay the note himself through the United States National?

A. No, he would send me a check.

Q. He sent you a check? A. Yes.

Q. And you paid them? A. Yes.

Q. And then you sent the renewal note later on?

A. Yes, he would send me up one to be signed and I signed it [327] and sent it back to him.

Q. Who was in active management of this Northwest Transportation Company?

A. Well, I was the president and manager of it, and signed the checks. We had a superintendent and bookkeeper.

Q. I do not mean that, I mean who was the head of it, who directed its management?

A. We took most of our orders from Mr. Stewart on that.

Q. Now, did you have some stock in it?

A. I was supposed to have one-half of the stock.

Q. When did you get that stock,—or you did not get it, did you, as a matter of fact?

A. I never got it.

Mr. MILLER.—I think it has been offered in evidence. It was never delivered to you? A. No.

Q. Where was it left so far as you know?

A. With Mr. Magill.

(Testimony of Frank Shepard.)

Q. And who was the owner of the balance of the stock?

A. I think Fritz Kruse had three or four shares, and Mr. Stewart had the rest.

Cross-examination.

(By Mr. GRINSTEAD.)

Q. Fritz Kruse was interested in that matter, arising out of the old Independent Navigation Company that had formerly had the boat? A. Yes.

Q. Was it not? A. Yes. [328]

Q. And that Company owed the bank a mortgage of \$7,500? A. Yes.

Q. The Kelso Bank? A. Yes.

Q. Now, as I understand your transaction, briefly Mr. Stewart and you agreed to organize,—or had the Northwest Transportation Company been organized prior to the time you dealt with Stewart?

A. Yes.

Q. It had? A. Yes.

Q. So that your deal was a straight outright buy from him of one-half of the capital stock of that corporation, for which you were to pay \$15,000, \$1000 cash and give notes for the rest? A. Yes.

Q. To Stewart? A. Yes.

Q. And you did that? A. Yes.

Q. And he continued to hold all the capital stock as security until you paid your notes, that is correct, isn't it?

A. I suppose that is the way it was, yes.

Q. And afterwards, after you had given this security of \$14,000 of notes, those notes, or portions

(Testimony of Frank Shepard.)

of them were presented by Stewart in the United States National Bank? A. Yes.

Mr. GRINSTEAD.—In lieu of some cross-examination, I think we can agree: Mr. Adams concedes all of these \$14,000 of notes that this witness gave Mr. Stewart for the interest [329] in the Northwest Transportation Company, Mr. Stewart put \$6,000, sold \$6,000 of those notes to the United States National Bank at Portland, but that the Kelso State Bank got the benefit of the \$6000,—not Stewart.

Mr. ADAMS.—That is all in evidence in the tickets. I do not want to agree to that exactly, because it is my remembrance that \$5,000 only went to the United States National.

Mr. GRINSTEAD.—You put \$6,000 in your claim.

Mr. ADAMS.—That claim may be wrong. I will get that in the record if you wish me to.

Mr. GRINSTEAD.—That money, whether it was \$5,000 or \$6,000, that the Kelso Bank got credit on Stewart's notes at the United States National Bank was used for what purpose?

Mr. ADAMS.—It was used to take up the notes of the Independent Navigation Company.

Mr. GRINSTEAD.—It was used to apply on the old note of the Independent Navigation Company for \$7,500 shown in your claim in connection with the Frank Shepard and Northwest Transportation Company.

Mr. ADAMS.—Stewart took credit for the \$14,-

(Testimony of Frank Shepard.)

000 less various notes part of the notes went in to the work of the Kelso State Bank and part of them went to the United States National Bank direct, without entering the work of the Kelso State Bank at all.

Mr. GRINSTEAD.—So that Stewart took out of the assets that he received from Mr. Shepard, certain moneys, and took care of the moneys that were due to the old Independent Navigation Company, that were due by the Old Independent Navigation Company, to the Kelso State Bank, and you have [330] shown it in your deposit.

Mr. ADAMS.—Yes.

Mr. MILLER.—We will show that Stewart got all the money that went to the Navigation Company. That debt was all Stewart's debt.

Mr. GRINSTEAD.—You mean he owned the Independent Navigation Company?

Mr. MILLER.—No, he got all that money, that \$7,500.

(By Mr. GRINSTEAD.)

Q. Then, as I understand your testimony, when one of these five or six thousand dollars of notes that were at the United States National Bank came due and you did not have the money, Mr. Stewart would send his check for a thousand dollars to you, with a letter telling you to go and take up that particular note when it became due, and you would deposit that check in your own bank account and then you would go to the United States National Bank and give your check, is that the idea?

(Testimony of Frank Shepard.)

A. Yes, that is the idea.

Q. You would buy the note and you would notify him that the bank had surrendered it and you would send a new note to him for that amount?

A. Yes.

The COURT.—As I understood from the original testimony, the witness would furinsh the interest and Stewart would furnish \$1,000?

Mr. GRINSTEAD.—The interest Mr. Shepard would pay.

WITNESS.—Yes.

Q. So that the notes that you would give to Mr. Stewart from month to month of a thousand dollars each, were simply [331] giving him renewal notes so far as you and he were concerned, for the original thousand dollar notes you had given him?

A. Yes.

Mr. GRINSTEAD.—Now, I understand that this testimony covers all of these thousand dollar notes of Frank Shepard's that are in the claim, and pressed against us here.

Mr. MILLER.—My understanding is that he had no other deal with the bank except the original \$14,000, and that these notes were renewals in some form or another of the original transaction.

Mr. GRINSTEAD.—Yes, but Judge Miller has this \$2,500 of April 3, 1920. I do not know whether you understand that this testimony applies to that one of these notes?

The COURT.—That is a Northwest Transportation Company note?

(Testimony of Frank Shepard.)

Mr. MILLER.—Did Shepard sign it?

Mr. GRINSTEAD.—I will ask him about it, if you wish.

Q. Do you remember the circumstance of your giving a note of the Northwest Transportation Company, signed by you as an officer of that Company, on April 3, 1920, or about that time? A. Yes.

Q. What was that for, what was the deal, do you recall it?

A. Well, I do not know whether that was for an oil bill that Stewart paid, or whether it was purchase money on the Steamer "Kellogg."

Q. This \$2,500 note arose out of two checks which Mr. Stewart gave to the Kellogg Transportation Company on March 31, 1920? [332]

A. That was the Kellogg deal, yes.

Q. What was the Kellogg deal?

A. Well, we bought the "Kellogg" for \$27,000.

Q. Who do you mean by we?

A. Stewart and I.

Q. The Northwest Transportation Company?

A. Yes.

Q. For how much? A. \$2,750.

Q. And what does the \$5,000 represented by these two checks of March 31, mean?

A. I did not have the money to pay this at that time.

Q. Half of that was for you, and half of it for him? A. Yes.

Q. And you gave your note to Stewart to cover your half?

(Testimony of Frank Shepard.)

A. I do not know whether I gave him my note.

Q. I do not mean you, but I mean your Company gave each of you notes for your \$2,500?

A. Yes.

Q. And this \$2,500 note here is not the note that was originally given you? A. Yes.

Q. Covering your half? A. I took a note back.

Q. Go ahead and tell it, that is what I want you to do. I do not want you to mis-tell it.

A. We took a note from the Northwest Transportation Company for our part of it, which I never did get, which I never had.

Q. When Stewart paid his check for the Northwest Transportation [333] Company for \$2,500, the Northwest Transportation Company gave him a note for \$2,500? A. Yes.

Q. And when he put up this check for you, the Northwest Transportation Company gave you a note for \$2,500? A. Yes.

Q. And then the matters between you and Mr. Stewart were settled up? A. Yes.

Q. And the company never paid either of you on those notes? A. No.

Q. The Northwest Transportation Company?

A. No.

Q. At the time you were going into the Northwest Transportation Company deal and at the time you went into this Kellogg deal, you thought you were going to make money out of it? A. Oh, yes.

Q. You would not have spent your money in it if you did not think so? A. No.

(Testimony of Frank Shepard.)

Q. How much money have you spent in connection with the Northwest Transportation Company?

A. About \$16,000.

Q. What do you mean? Lost that much?

A. Spent that much.

Q. And lost it? A. Yes.

Q. Showing you this document, executed by the Northwest Transportation and the Kellogg Transportation Company, is [334] that the agreement you made at the time you got the "Joseph Kellogg"? A. That is my signature.

Q. Is that the document representing the deal that you made, that the Northwest Transportation Company made in buying the boat you called the "Kellogg"? A. Yes, that is it.

Q. Stewart also spent a good deal of money as well as you spending that \$16,000, trying to work out the Northwest Transportation Company?

A. No.

Q. He spent some \$3,000 in repairing the "Olympian"? A. That was before I went in.

Q. That was before you went in? A. Yes.

Q. He had paid that in; he never got that out?

A. Not while I was in it.

Mr. GRINSTED.—Let these two checks of March 31, and this agreement between the Northwest Transportation Company and the Kellogg Transportation Company, be offered as one exhibit.

The COURT.—It will be admitted.

Thereupon said checks and agreement between Northwest Transportation Company and

(Testimony of Frank Shepard.)

Kellogg Transportation, were received in evidence and marked as Defendant's Exhibit 22-A.

Mr. GRINSTEAD.—Now, Judge Miller, I intend to show the witness a number of checks of a thousand dollars each that Stewart sent Mr. Shepard to take up those notes with, but, I want an understanding with you that there are two of [335] those checks missing, July and August, 1920, and that is the same bunch of checks that we spoke of the other day as being missing from the records and files.

Mr. MILLER.—We have no objection to admitting that there were two more of the same character.

Mr. GRINSTEAD.—There are two more checks that should be in that bunch that are missing from the files of Stewart's cancelled checks. Those are a portion of the checks that you testified to receiving from Mr. Stewart for the purpose of taking up the notes at the National Bank?

Mr. SHEPARD.—Yes.

Mr. GRINSTEAD.—Let these four checks go in evidence.

Mr. MILLER.—I have no objection.

The COURT.—Then I understand it is admitted that there are two others missing?

Mr. MILLER.—Yes, sir.

Mr. GRINSTEAD.—That shows \$6,000 that Stewart paid.

(Testimony of Frank Shepard.)

Said four checks were received in evidence and marked as Defendant's Exhibit 23-A.

Q. Did you have any understanding with Mr. Stewart relative to his disposing of his interest in the Northwest Transportation Company?

A. Nothing more than he said any time I wanted the other half interest, I could have it.

Q. You never had agreed to buy it?

A. I should say not.

Q. Now, I asked you a little time ago if Mr. Stewart was not spending considerable money while you were spending your \$16,000 in connection with these same matters. I want to show you his check to the Kellogg Transportation Company [336] May 3, 1920, in the sum of \$2,010. Can you tell me what that check was for? A. Yes.

Q. What was it?

A. That was to pay the second payment on the "Kellogg."

Q. That was paid on the purchase of the "Kellogg," his portion? A. Yes.

Q. \$2,010,—\$10 was interest? A. Yes.

Q. And you also paid \$2,010? A. Yes

Mr. GRINSTEAD.—We offer that check in evidence.

The COURT.—Admitted.

Thereupon said check of May 3, 1920, Stewart to Kellogg, was received in evidence and marked as Defendant's Exhibit 24-A.

Mr. GRINSTEAD.—There is the Frank Shep-

(Testimony of Frank Shepard.)

ard note of \$589.40. You did not examine the witness directly on that.

Mr. MILLER.—Well, we have waived that note.

The COURT.—What is that?

Mr. GRINSTEAD.—Note of March 11, 1920, signed by Frank Shepard in the sum of \$589.40. Counsel states that they will waive that claim.

Now, before the witness leaves the stand, there is the matter of the Northwest Transportation Company note of September 1, 1920, in the sum of \$5,000 where you are claiming against us in the sum of \$2,104.78. I do not understand you examined him in chief on that. It seems to me we ought to go into that with him. [337]

Mr. MILLER.—I am willing, and I will ask the witness a question along that line.

Direct Examination (Continued).

(By Mr. MILLER.)

Q. These were notes given by the Northwest Transportation Company to Stewart?

A. I do not know whether to Stewart or to the Bank.

Mr. MILLER.—The records show that.

Q. What were they for?

A. They were for miscellaneous things, oil bills and repair bills, money he had advanced to the Northwest Transportation Company.

Q. Matters connected with the Northwest Transportation Company. A. Yes.

Q. That you and he were operating? A. Yes.

Q. As far as you individually were concerned, the

(Testimony of Frank Shepard.)

only deal you had was when you purchased one-half interest and gave these fourteen notes,—these Shepard notes? A. Yes.

Q. Or those growing out of them? A. Yes.

Q. The Northwest Transportation notes, did they pertain to operation, or notes connected with the Transportation Company?

A. Yes, that is what they were for.

Q. You purchased the “Kellogg,” the steamer “Kellogg”? [338]

A. We purchased the “Kellogg” through the Northwest Transportation Company, but Stewart and I together signed the notes personally, endorsed the Northwest Transportation paper.

Q. And you personally had to pay it? A. Yes.

Q. And you later sold that boat, did you?

A. Yes, we later sold that boat for \$19,000.

Q. You paid how much for it? A. \$27,500.

Q. And you sold it for \$19,500? A. Yes.

Q. Were you ever reimbursed any part that you advanced on the “Kellogg”? A. Not a cent.

Q. You lost that? A. Yes.

Q. And to be brief about it, to shorten it up, all of these Northwest Transportation Company notes that were turned over to the bank or turned over to Stewart, grew out of the operation of the Northwest Transportation Company in some manner? A. Yes.

Q. Without going into the details of it?

A. Yes.

(Testimony of Frank Shepard.)

Q. You personally had no business with the bank at any time? A. No.

Q. And did the Northwest Transportation Company have any direct dealings with the bank?

A. Not that I know of in any way. [339]

Mr. GRINSTEAD.—Now, Judge Miller, relative to this September 1, 1920, note, I have here some letters and copies of answering letters and so on that pertain to that matter, which I would like to offer in evidence, with permission to introduce copies after this witness has identified them.

Mr. MILLER.—We have no objection.

Mr. GRINSTEAD.—I think they explain that transaction, and I will offer them in evidence,

Mr. MILLER.—We have no objection to this correspondence.

Cross-examination (Continued).

(By Mr. GRINSTEAD.)

Q. I show you a letter addressed to George F. Plamondon as assistant cashier of the Kelso State Bank under date of July 30, 1920, and signed by "Auditor." The copy I have does not say who the auditor is. Do you know whether or not that letter is a copy of one that went in the usual course of business to the Northwest Transportation Company?

A. Well, I do not know whether that did or not. I know we had a lot of correspondence with Mr. Plamondon.

Mr. DAVIS.—I got that file from your book-keeper down there.

WITNESS.—You got this from Sorensen?

(Testimony of Frank Shepard.)

Mr. DAVIS.—Yes.

WITNESS.—I guess he wrote the letter to Stewart and Plamondon, I could not say about that.

Q. If this was found in the files of the Northwest Transportation Company and turned over to Davis by Mr. [340] Sorensen, you would admit that this is part of the correspondence? A. Yes.

Mr. MILLER.—Didn't we admit this in evidence?

Mr. GRINSTEAD.—You admit they went through in the ordinary way?

Mr. MILLER.—Yes.

Q. In the same manner I offer you a letter to F. L. Stewart from the Northwest Transportation Company signed Auditor, under date of August 19, 1920? A. Yes.

Q. That letter refers to certain checks which the Northwest Transportation Company says Mr. Stewart has advanced for the company? A. Yes.

Q. I show you a check of June 18, 1920, to the Kalama and Columbia River Towing Company in the sum of \$600. Is this the check that covered the item of that amount in the letter? A. Yes.

Q. Showing you a check to the Associated Oil Company dated June 18, 1920, in the sum of \$1,984.-62, is a check of that amount mentioned in the letter? A. Yes, sir.

Q. Showing you a check to Fair, Shaner & Gulley in the sum of \$1,000 dated August 30, 1920, is that check mentioned in the letter?

A. Pencilled in.

(Testimony of Frank Shepard.)

Q. Written in after the original writing had been made? A. Yes. [341]

Q. Do you know whether the advances mentioned in that letter were made by Stewart?

A. They were.

Q. Do you know whether the advancements mentioned in the letter by the Northwest Transportation Company were actually paid out by Stewart?

A. Well, Stewart was taking care of a lot of bills along about that time.

Q. I am going to put all of this group of checks and everything into one exhibit. Now, I will show you a letter from George F. Plamondon to the Northwest Transportation Company under date of August 30, 1920. That was a letter that was received by the Company? A. Yes, sir.

Mr. GRINSTEAD.—Now I will substitute copies so that these files of the Northwest Transportation Company will be intact. Now, I will offer as one exhibit, three letters and three checks which the witness has just been asked about and I will state in that connection that the letter of August 19, refers to other expenditures and that so far we have not been able to locate those other checks, but they may be there in the files.

The COURT.—That is some checks mentioned in one of the letters.

Mr. GRINSTEAD.—We have not attached them here. The volume of work has been too heavy to find them. They may be there.

The COURT.—Admitted.

(Testimony of Frank Shepard.)

Thereupon said letters and checks in re Northwest Transportation Company, were received in evidence and marked as Defendant's Exhibit 25-A. [342]

Q. There is one other question I want to ask you. At the time you bought into the Northwest Transportation Company, you were not insolvent?

A. No, sir.

Q. What were you worth at that time?

A. Well, pretty hard to say. I just had a good going bus business there in Portland, one of the best.

Q. What did you consider yourself worth at that time? A. Oh, \$60,000 to \$65,000.

Redirect Examination.

(By Mr. MILLER.)

Q. Did this connection with Stewart break you up? A. What did you say?

Q. I say did your experience with Mr. Stewart in the transportation business,—

A. Well, it caused me to lose my bus business.

Q. It caused you to lose it? A. Yes.

Q. What became of the Northwest Transportation Company, did it have any assets? A. No.

Q. Went entirely on the rocks? A. Yes.

Q. Referring to those two checks attached to Exhibit 22-A, do you know whether notes were given for those checks?

A. No, I do not know whether I gave Mr. Stewart a note at that time, or whether I went down to my office and gave him my checks. [343]

(Testimony of Frank Shepard.)

Mr. GRINSTEAD.—I do not think the witness understands the question.

Q. These are two checks to the Kellogg Transportation Company, by Mr. Stewart, payable to the Kellogg Transportation Company, one check for \$2,500 and another check for \$2,500, both the same date, what I want to know is whether the Northwest Transportation Company executed the notes?

A. Yes, that is what I understood.

Q. For these checks? A. Yes.

Q. One to you and one to Stewart? A. Yes.

Mr. MILLER.—That is all.

(Witness excused.) [344]

Mr. GRINSTEAD.—We have asked Mr. Plamondon to stay here, expecting there might be some testimony offered by the plaintiff from Mr. Carothers, thinking it would be very difficult for us to cross-examine him without Mr. Plamondon being here and knowing the records and being familiar with them. If counsel states Mr. Carothers will not go on as a witness, I will be glad to let Mr. Plamondon go back, as he is begging me to get away.

Mr. MILLER.—I have no present intention at all of calling Mr. Carothers.

Mr. GRINSTEAD.—Upon that understanding, the Court may excuse Mr. Plamondon.

Mr. MILLER.—Mr. Plamondon, you are excused.

Mr. GRINSTEAD.—Mr. Moser is excused as far as we are concerned.

(Testimony of T. H. Adams.)

Mr. MILLER.—We will now recall Mr. Adams for further cross-examination. [345]

Testimony of T. H. Adams, for Plaintiff (Recalled).

Mr. ADAMS, being recalled, continued his testimony as follows:

Cross-examination (Continued).

Q. Now, turning to the transaction with H. D. Phillips, the note that went into the bank, March 20, 1918, you showed in your previous testimony that this sum of \$67.90 which you are suing us here for, was a sum of money that was the division of the commissions on a life insurance policy on Mr. Phillips? A. Yes.

Q. Have you that policy? A. I believe I have.

Q. This policy you have handed me, is a policy on the life of H. D. Phillips where Stewart took credit for \$67.90 as his division of the premiums?

A. That is my understanding of it.

Q. Included in the policy, is an assignment, executed by Howard D. Phillips, making the policy accrue, for the benefit of the Kelso State Bank,—isn't that correct? A. It is.

Mr. GRINSTEAD.—I offer that policy in evidence.

Thereupon said life insurance policy of H. D. Phillips, was received in evidence and marked as Defendant's Exhibit 31-A.

WITNESS.—Let me see the policy.

Q. That is correct, isn't it?

A. Yes. That policy, though, is an informal sort

(Testimony of T. H. Adams.)

of an assignment, not ratified by the Company, as you notice. It does not make any difference, it is not any good anyway. [346]

Q. Referring now to the Northwest Transportation Company's note, March 10, 1921, I show you an original letter from F. L. Stewart, cashier, to the Northwest Transportation Company, dated February 24, 1921, and a copy of a letter apparently in answer to that, dated February 26, 1921, and signed by auditor and addressed to Stewart and ask you to identify it. You agree to that, don't you, Mr. Miller?

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—And also agree I can substitute copies?

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—We offer these in evidence.

Thereupon said copies of letters between Stewart and Northwest Transportation Company, February 24, 1921, and February 26, 1921, were received in evidence and marked Defendant's Exhibit 37-A.

The COURT.—This is in reference to Transportation Company note of March 10, 1921? A. Yes.

Q. What is the amount of it?

A. \$1,250. There are two on that date, March 10, 1921.

Mr. DAVIS.—Isn't that note in evidence, that \$1,250 note?

Mr. GRINSTEAD.—That note apparently was introduced as Exhibit 8. [347]

(Testimony of T. H. Adams.)

Mr. DAVIS.—Yes, this note, may it please the Court, is dated January 19, 1921, and the letters are dated what date, Judge Miller?

Mr. MILLER.—February 24, and the answer is February 26, but it says, you will note deposit of \$1,250 made on January 19.

Mr. DAVIS.—The note was merely dated back to the date of the deposit, so that he would get interest on it.

Mr. GRINSTEAD.—I think that is all of the cross-examination at this time.

Redirect Examination.

(By Mr. MILLER.)

Q. You heard Mr. Kruse testify here yesterday that the \$5,000 note had been surrendered to him before the other two notes were taken by him?

A. Yes.

Q. What does the bank book show about that?

Mr. DAVIS.—Is this an attempt to impeach your own witness?

Mr. GRINSTEAD.—I doubt whether they can put Mr. Kruse on the stand and then attempt to dispute his testimony. I object to that.

The COURT.—Objection overruled.

Mr. ADAMS.—There wasn't any very good way to avoid calling him that I know of.

Mr. GRINSTEAD.—They called a witness to testify about these transactions and he has given his testimony and they are going to impeach him. [348]

The COURT.—I do not know whether they are going to impeach him or not.

Mr. GRINSTEAD.—I object to this.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—They did not give the witness a chance to correct himself. They did not hold him here so that we could go into the matter, and now after he has gone away, they come in here to impeach his testimony. We object to it on that ground.

The COURT.—That may be ground for an application for a continuance, but at this time I overrule the objection.

Mr. MILLER.—Will you get the books to show about these things?

Mr. GRINSTEAD.—This witness has already given the dates. Mr. Adams spent an hour and a half on that matter. His testimony was given in detail day by day, from the deposit slips and the cage-book, and I have a copy of it here.

Mr. MILLER.—We can show it again, if it is necessary.

Mr. GRINSTEAD.—We object further as repetition. It is all in evidence here.

The COURT.—I do not know whether it is or not.

Mr. MILLER.—I merely wanted to show that the date the \$5,000 went out of the bank, these two \$2,500 notes were taken in.

Mr. DAVIS.—This leaves us in a position where a witness comes in here and testifies that this covers another deal where they were taking a mortgage or

something, and they have let him go, and now they come and try to contradict him with this testimony. He testified [349] he got this consideration for the second \$2,500.

Mr. MILLER.—He never got any consideration at all.

The COURT.—That may be a reason for taking his testimony later. I will not keep it out on the strength of his having left.

Mr. ADAMS.—There is absolutely nothing inconsistent between the record and Mr. Kruse's testimony.

Mr. MILLER.—What is the record?

Mr. GRINSTEAD.—Mr. Adams testified from the records the other day that the note of September 10, 1920, that is the \$5,000 note, was retired by the Kruse notes, of February 9, 1921, each in the sum of \$2,500, one bearing registered number 1875 and the other number 1876, and both went in as Exhibit 4, and he could not, if he sat here an hour, or a week, he could not do more than say the same thing over again.

Mr. MILLER.—If that is what the record already shows,—

Mr. GRINSTEAD.—That is already in evidence from his testimony from the books. We took an awful lot of time the other day on that matter and I do not think we ought to be penalized now by having to go over it again. He testified that one note went out of the bank the same day as the others came in. This witness that they had this morning,

(Testimony of T. H. Adams.)

has stated here, that one note was paid and there was entirely different consideration for the notes that they now hold.

Mr. DAVIS.—We will concede that the records show that one note was paid the very day the others came in; that their records show that. [350]

Mr. GRINSTEAD.—We concede that the record shows just what they said they showed the other day.

Mr. MILLER.—What is that?

Mr. GRINSTEAD.—That the \$5,000 note was paid on the same date that the \$2,500 notes came in there; that they said the records show that.

Mr. MILLER.—All right, if that is already in the record.

Q. Now, have you made a list, or are you in a position to show, of those Northwest Transportation Company notes, how much the bank lost by reason of those Transportation Company notes?

A. Yes, well, I cannot,—that is a matter not yet determined, the exact amount the bank lost.

Q. Just as near as you can determine how much it lost?

Mr. GRINSTEAD.—I think that this is immaterial and it is over our objection.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception.

The COURT.—Allowed.

Mr. GRINSTEAD.—These are not the notes that you settled?

Mr. MILLER.—What do you mean by settled?

Mr. GRINSTEAD.—The Frank Shepard notes.

(Testimony of T. H. Adams.)

Mr. MILLER.—No, not Frank Shepard notes.

Mr. ADAMS.—This is the Northwest Transportation Company.

Q. What is going to be the loss to the bank on these Northwest Transportation Company notes?

A. Taking that up in a kind of an informal way, the bank held the mortgage on the steamer "Olympian" for \$5,000. The "Olympian" was sold for \$2,700 and there had been paid in expenses and taxes, \$400 in round numbers; [351] \$319 in taxes and some advertising expenses and so on, perhaps aggregating \$500.

Q. Those expenses and taxes aggregated \$500?

A. Yes.

Q. That left how much that you received on account of or from that sale?

A. Well, \$2,300 would be the outside figure, probably not that.

Q. That you received net? A. Yes.

Q. How many notes of this company were in the bank when the bank closed, or that you have become responsible for since?

A. The notes aggregated \$12,750 in the bank at the time it closed. There have been rediscounted, with the Continental and Commercial National Bank, Chicago, notes of \$2,000, which has been surrendered and a claim filed and of course what we paid on that or how that will terminate, renders it impossible to show just what the loss would be on that. Then there was another note of \$5,000 sold to Mr. S. A. George. He sued us on that and we lost.

(Testimony of T. H. Adams.)

Which would make the total notes in the bank and coming back to the bank, \$19,750.

Q. What will be the bank's loss aside from this note, that the Continental has presented, which we cannot tell,—

A. The Continental note and the George note are in the same fix or relationship.

Q. They are merely disputed claims?

A. If we are able to pay one hundred cents on the dollar, the loss would represent the face of the notes.

Q. Amounting altogether to how much? [352]

A. Well, \$19,750 less \$2,200 or \$2,300, the amount realized on the boat.

Q. It is only a part of these notes you have so far charged in this case?

A. We have only charged the items that went to Stewart's personal credit.

Q. The other notes you have so far charged against them are the notes given by the Transportation Company, the Northwest Transportation Company to the bank, and which the bank has lost?

A. Yes.

Mr. MILLER.—I want to take this position before the Court; it is our position now, since the evidence has come out here this morning from Mr. Shepard, that the bonding company, defendant in this action, is responsible for all the loss which the bank sustained, through its dealings with the Northwest Transportation Company, whether the money went to Stewart or not. Under the statute we shall

(Testimony of T. H. Adams.)

cite, it is made a felony for Stewart, either directly or indirectly, to borrow any money from the bank, and I contend that he cannot take a corporation he was interested in and turn over worthless credits to the bank he was responsible for, whether he got the money or not, if the bank loses it; and it is not necessary for us to present any claim to the bank at all, because the position we take is that this was a statutory bond and that they are liable under the conditions fixed by the statute. We can argue that out at the final argument, but we have not asked for this in our complaint, and it may be necessary for us to amend. [353]

Mr. GRINSTEAD.—The Court understands we are not consenting to any such amendment.

Mr. MILLER.—That is all.

Mr. GRINSTEAD.—I wish to move to strike the witness' testimony as to the losses on the Northwest Transportation Company notes, as being conclusions of the witness, remote and speculative.

The COURT.—Motion denied.

Mr. GRINSTEAD.—Exception, please.

The COURT.—Allowed.

Mr. MILLER.—Going to another subject; you have been in charge of the assets of the bank, Mr. Adams, for some time, of course.

Mr. ADAMS.—Since April 28, 1921.

Q. Can you tell the Court about what percentage you will be able to pay the depositors?

Mr. GRINSTEAD.—We want to renew our objection to that sort of testimony, as being remote,

speculative, calling for a conclusion of the witness and incompetent, irrelevant and immaterial under the pleadings in this case.

The COURT.—What is the purpose?

Mr. MILLER.—The purpose is to show that during the time these losses arose, the Phillips loan, and the Kruse loan and the dealing with the Northwest Transportation Company and all the others,—unless possibly the Moser notes,—that the Company was insolvent.

The COURT.—Then you are going to follow this up?

Mr. MILLER.—I just wanted to show, which is preliminary, that during this time, the bank was insolvent. [354]

The COURT.—Unable to pay the depositors anything?

Mr. MILLER.—We will be able to show that they were insolvent back during all of this time. There was no substantial change as to the condition of the bank.

The COURT.—I will overrule the objection. It is rather removed.

Mr. GRINSTEAD.—I do not see how this is rebuttal or cross-examination.

The COURT.—Objection overruled.

Mr. MILLER.—This is the same statute I have been referring to, making it a felony to take excessive loans from the bank,—

Mr. GRINSTEAD.—Which statute is it?

Mr. MILLER.—1917.

(Testimony of T. H. Adams.)

The COURT.—Answer the question.

The WITNESS.—What is the question, please?

Mr. MILLER.—I asked you about the condition of the bank at the time it went into the hands of the Bank Commissioner, whether it was insolvent at that time?

A. It was insolvent at that time.

Q. And for how long a period prior to that time had it been in that condition?

A. It is a grave question in my mind whether it was ever solvent, or within the records of the books that we have.

Q. Covering the period that has been involved in this controversy, back to 1915 or '16, from then on down to 1921, can you say whether it was insolvent or not?

A. The bank was clearly insolvent during all that time.

Q. The bank was insolvent during all that time?

A. Yes. [355]

Q. Including the year 1915?

A. I would say including the year 1915.

Q. '15, '16, '17, '18, '19, '20 and up to March 17, 1921, was there any substantial difference in the condition in 1921 from what it was two or three years previous? A. No substantial difference.

Q. Substantially the same? A. Yes.

Q. I believe you have not just stated to the Court about what the depositors will receive, so far as you can now tell.

A. That is dependent so much on this litigation.

(Testimony of T. H. Adams.)

Q. Leaving out this lawsuit.

A. And another suit we have with this same Company that is not finally determined.

The COURT.—If you cannot answer, say so.

Q. Just answer in a general way.

Mr. GRINSTEAD.—Of course I am objecting to all of this.

The COURT.—I overruled the objection to this question once.

A. May I state the matter this way: I cannot see anything that could come up that would prevent us from paying 35 cents on the dollar.

Q. You will pay at least 35 cents on the dollar?

A. We would be losing all the suits that are involved and I think we could pay 35 cents. If we are successful in everything, I would say we might pay 60 cents.

Q. That would include this litigation?

A. That would include this, and would include some, I believe we may be able to recover from the Board of Directors.

Q. I am handing you a paper there. [356]

Mr. GRINSTEAD.—You do not have to identify it; I will admit that.

Mr. MILLER.—All right.

Mr. GRINSTEAD.—The paper you are identifying will be marked exhibit 27.

Mr. MILLER.—This is an agreement between the defendant Company and Stewart.

Mr. GRINSTEAD.—This is the soliciting agent's

authority from the T. and D. to Stewart, dated March 21, 1913, which speaks for itself as to what his duties were.

Thereupon said soliciting agents agreement was offered and received in evidence and marked as Plaintiff's Exhibit 27.

Mr. MILLER.—I believe that is all, Mr. Adams, unless there is something you think about.

Mr. GRINSTEAD.—No further questions from us.

Mr. MILLER.—Referring now, Mr. Adams, to what we shall term the Rickter warrants.

Mr. GRINSTEAD.—That is the item of 10/23-20, the testimony on that has gone in over our objection on the ground of failure of notice.

Mr. MILLER.—The Rickter warrants came up after the claim was presented.

The COURT.—It seems they were entitled to some claim or notice. How do you get around the provision as to that? It is your claim that they had no right except that provided in the statutes.

Mr. MILLER.—Undoubtedly, yes, your Honor.

The COURT.—I will overrule the objection at the present, and finally rule on it in deciding the case.
[357]

Mr. GRINSTEAD.—It is not rebuttal either, your Honor; we have not gone into that matter on our cross-examination.

The COURT.—Objection overruled.

Mr. MILLER.—This comes in response to the statement you made that this was within the juris-

(Testimony of T. H. Adams.)

diction of another court, and that this court has no jurisdiction.

Mr. GRINSTEAD.—I was overruled on that contention and there is nothing to go on here, so why continue with the talk?

The COURT.—There is nothing before the Court on which I know that it is out of the Court's jurisdiction.

Mr. MILLER.—Well, I do not think I will go into it then, I think the Court is right about that.

Q. Counsel asked once or twice if you had only claimed against the defendant here on notes that you could show that Stewart had gotten the money, where the money had been credited to Stewart, something of that kind. Is that correct?

A. As I understand, his question was that whenever we found something that Stewart got credit for, we immediately charged the company.

Q. Yes. A. Yes.

Q. Is that altogether the case,—were there other things you could have charged that you did not charge?

A. Since that time I have found a great number that Stewart participated in the benefits of.

Q. But they have not been charged against the company?

A. That were not charged and we do not claim on.

Q. At the time this claim was made out to the

(Testimony of T. H. Adams.)

company, [358] did you then know about the Rickter warrants? A. No, I did not.

Q. Has that come up since? A. Yes.

Q. In the course of this litigation over there?

A. Yes, in the course of Mr. Davis' investigation, in calling my attention to them, I believe was the origin of that.

Mr. GRINSTEAD.—When was that you say that you first learned of these Rieter warrants?

A. I could not give the dates, it was during Mr. Davis' investigation.

Q. Summer of 1921? A. Yes.

Mr. GRINSTEAD.—That is all.

Mr. ADAMS.—While it is immaterial to me, I think on your cross-examination, you excuse me, and you had some further testimony you probably wanted to bring out later. I am just calling your attention so that you will not forget it.

Mr. MILLER.—I do not remember of anything further just now.

Mr. ADAMS.—You can talk to me about it later? (Witness excused.) [359]

Testimony of Elden Dunham, for Plaintiff.

ELDEN DUNHAM, a witness called by the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. What is your name? A. Elden Dunham.

Q. Have you run down the records of the In-

(Testimony of Elden Dunham.)

dependent Navigation Company to ascertain the origin of the indebtedness of \$7,500?

A. I have.

Q. That the Northwest Transportation Company paid for? A. I have.

Q. Will you give the records pertaining to that?

Mr. MILLER.—It has been claimed by counsel that this old Company owed the bank and that this Northwest Transportation Company was really reimbursing the bank. I want to show that that was Stewart's debt originally and not the bank's.

Mr. GRINSTEAD.—Of course we are not apprised by the pleadings, of any claim that goes back of the Independent Navigation Company, and we are not prepared to meet it.

The COURT.—Objection overruled.

Mr. GRINSTEAD.—Exception.

The COURT.—Allowed.

Mr. MILLER.—Where did the notes start?

Mr. GRINSTEAD.—This is in connection with Shepard and the Northwest Transportation Company?

Mr. MILLER.—This is in relation to the Independent Navigation Company, first. [360]

Mr. GRINSTEAD.—I am objecting to going into the Independent Navigation Company matters here, at the close of this trial. We have not attempted anything further than to trace what appears on the face of their claim, which Mr. Adams himself has agreed is correct. That is as far as we have gone. We are not prepared to go back into the

(Testimony of Elden Dunham.)

early history of the Independent Navigation Company. We do not know anything about it.

The COURT.—My impression of it is not entirely clear, but as I understand it, Mr. Grinstead, in his examination, left it, *prima facie*, that the Northwest Transportation Company was paying up a debt of the Independent Navigation Company to the bank. Of course it is proper rebuttal for Mr. Miller to question that and go back a little further and show something else. I overrule the objection.

Mr. MILLER.—That is what I am trying to do, and also Mr. Ayers testified he turned over \$4,800 to Mr. Stewart.

The COURT.—Go ahead.

Q. What is the first record?

A. The old Independent Navigation Company indebtedness begins with a \$500 note on September 17, 1917. Now, on that date this \$500 note was credited entirely to Stewart.

Q. Suppose you tell it to us without following through the books, and we will see where we come out.

A. Then on November 23, of the same year, 1917, another note for 4,800 was discounted to the bank.

Q. Whose note was that?

A. This was the old Navigation Company's note, also. Of the proceeds of this note, the Cowlitz Bridge Company received on their old indebtedness to be paid on their [361] note, the sum of \$2,160, and interest amounting to \$20.16; Stewart taking the balance, amount to \$2,619.84.

(Testimony of Elden Dunham.)

Q. Now, right in that connection, what became of that part that went to the Bridge Company?

A. On December 19, 1917, Stewart was reimbursed \$2,160 by Cowlitz Bridge Company note taken on that date, December 10.

Mr. GRINSTEAD.—Stop it right here, please. He said that Stewart took credit for \$2,619.84. What do you mean by saying Stewart was reimbursed \$2,160?

A. Reimbursed on the \$2,160 he applied to the Cowlitz Bridge Company indebtedness. That shows he got credit for the whole amount.

Q. Go ahead.

A. If you wish me to follow these renewals on down, I can trace that indebtedness.

Q. You have it there in the paper? A. Yes.

Q. Go ahead.

On January 21, 1918, a \$6,000 note was discounted of the Independent Navigation Company. The proceeds of this note went to take up the two prior notes amounting to \$500 and \$4,800, and interest on both amounting to \$60.70. Now these are listed separately in the records, but I have consolidated them here. There was also revenue of \$120, Stewart receiving \$638.07, the balance.

Q. That would be the difference?

A. The difference. On July 2, 1918, a new note was discounted.

Q. On July 2, 1918, a new note?

A. On July 2, 1918, a new note was discounted, amounting to [362] \$6,500. This took care of the

(Testimony of Elden Dunham.)

prior note of \$6,000, interest revenue and so forth, Stewart receiving the balance amounting to \$318.70. Then on November 19, 1919, a new note appears for \$7,500. This takes care of the prior note of \$6,500 and interest, revenue and so forth, Stewart receiving \$413.50, which was the difference in the transaction. Further, on March 5, 1920, the old Independent Navigation Company note of \$7,500 was taken up from the proceeds of Frank Shepard's fourteen \$1,000 notes on that date, and also interest to the amount of \$376.67.

Mr. GRINSTEAD.—We do not need to go into the record if this statement is to be offered in evidence. He is reading from that statement. That piece of paper there, Mr. Dunham, is a memorandum you made from the records, and you have been reading from it in giving this testimony. A. It is.

Mr. MILLER.—Then we will offer it in evidence.

Thereupon said statement of Independent Navigation Company accounts was received in evidence and marked as Exhibit 28.

Q. Now, you worked in the bank at Kelso?

A. I did.

Q. For how long?

A. From September, 1913, continuously to the time the bank closed, except for the time I was in the service.

Q. When you were out of the service, your last work there commenced when and continued until when?

(Testimony of Elden Dunham.)

A. The last work commenced the 1st of July, 1919.

Q. From that time you worked continuously until the bank [363] closed? A. Yes.

Q. What capacity were you working in there?

A. During this later period?

Q. Yes.

A. Teller and bookkeeper, I would say.

Q. Do you know Mr. Baxter, one of the directors?

A. I do.

Q. What is his business?

A. Principally farming.

Q. Where was he farming?

A. West of Kelso, I would say. He owned a small farm but he did not do much active farming himself. Mr. Baxter is a rather old man.

Q. Did he give any attention to the business affairs of the bank?

A. In what way, as a director?

Q. Yes.

A. Well, I believe I would have to answer no to that.

Q. How is that?

A. I would have to say no to that.

Q. He did not pay any attention to it? A. No.

Q. Was he ever about there?

A. Very occasionally he would appear in the bank, probably on personal business.

Q. Did you know Mr. Marsh, one of the other directors? A. I did.

Q. Where was he living?

(Testimony of Elden Dunham.)

A. You refer to this same period? [364]

Q. How is that?

A. That is just about this time,—

Q. What time?

A. Period of 1919 and 1920. Mr. Marsh resided at Ostrander, and it was about this same time he moved to Dryad, Washington.

Q. That is out in Lewis County? A. Yes, sir.

Q. He never lived in Kelso thereafter? A. No.

Q. Did he ever live in Kelso?

A. No, Mr. Marsh was not in Kelso to my knowledge.

Q. The last two years, at least, he has been living in Lewis County? A. Yes.

Q. Was he ever about the bank at all, or pay any attention to its business affairs?

A. I believe not. All the time I was with the bank, I saw Mr. Marsh there once.

Q. Once? A. Once.

Q. How long ago was that?

A. Oh, that must have been prior to the time I went in the service. I am not saying Mr. Marsh has not been in the bank since.

Q. But you did not see him?

A. Not to my knowledge.

Q. And Mr. Wallace, what is his business?

A. Mr. Wallace is president of the Wallace Land Company, devotes most of his time to that enterprise. [365]

Q. What was his business aside from that?

(Testimony of Elden Dunham.)

A. Aside from that he was a farmer, a retired farmer.

Q. Did he give any attention to this bank?

A. No, Mr. Wallace was about in the same status as Mr. Baxter.

Q. He is an old man also? A. Yes.

Q. What is Mr. Carothers' business?

A. Mr. Carothers is a merchant.

Q. What sort of a merchant?

A. Handles groceries.

Q. Grocery store? A. Yes.

Q. There in Kelso? A. Yes.

Q. Did he ever give any of his time to the bank, so far as you know?

A. Mr. Carothers probably visited the bank more often than Mr. Wallace or Mr. Baxter, but it was as far as my best belief and knowledge, mostly on personal business.

Q. How is that?

A. I say most of his visits to the bank, I would say, would be to take care of his personal business. He banked there, of course.

Q. Who actually looked after and handled the business of the bank?

A. The active management of the bank?

Q. Yes.

A. Fred Stewart.

Q. There has been some testimony about the meetings of the [366] directors; do you know whether they did meet at all or not? How did they meet, do you know?

(Testimony of Elden Dunham.)

Mr. DAVIS.—This man is not qualified to answer.

Mr. MILLER.—What did they do?

Mr. GRINSTEAD.—If he was present at the directors' meetings, all right.

The COURT.—I will overrule the objection.

A. Well, working in the bank, I could not say. I am not in a position to answer that question correctly.

Q. What did you observe and see?

A. From my observation I usually knew the day when the annual meeting took place; that is they would be in there, from two to three hours, and anyone working in the bank would know when one of those meetings was going on.

Q. Those annual meetings?

A. Yes, the annual meetings but outside of the regular called annual meetings, I could not say I ever observed a regular meeting.

Q. How did Mr. Stewart act towards the directors at the meetings? That is, how were the directors meetings carried on?

A. You are asking me a question, Judge, I will have to answer, only from observation.

Q. That is what I am asking you.

A. It seemed to me Mr. Stewart did all the talking.

Q. Did they have regular meetings, or would he sometimes talk to one director and sometimes to the other?

(Testimony of Elden Dunham.)

A. The only meetings I ever observed, were the annual meetings.

Mr. MILLER.—You may cross-examine. [367]

Cross-examination.

(By Mr. GRINSTEAD.)

Q. You were not called upon to attend the meetings of the directors? A. Oh, no, no.

Q. If they held night sessions, in accordance with the resolutions in their minutes, you would not be there, necessarily?

A. No, no, in case any meeting was held at night, I probably would not know about it.

Q. And that would be true Saturday afternoons after you were through with your work?

A. I probably worked most every Saturday, probably all afternoon.

Mr. GRINSTEAD.—That is all.

Mr. MILLER.—That is all.

(Witness excused.)

Plaintiff rested. [368]

Mr. GRINSTEAD.—Judge Miller, I understand you will stipulate that the various documents pleased by exhibits, in the answer of the defendant, are all true and correct copies? We have the original here, but we can save time.

Mr. MILLER.—Sure, we will admit that.

Mr. GRINSTEAD.—And they were delivered and so forth in accordance with the pleadings?

Mr. MILLER.—Yes. He might introduce all of these. Of course the legal effect of the papers we will argue to the Court later on.

Mr. GRINSTEAD.—I was wondering if it would be necessary to pull out all of these originals.

Mr. MILLER.—No, let them go in.

Mr. GRINSTEAD.—Let us check them out.

Mr. MILLER.—The copies are in the pleadings and they may be considered in evidence.

The COURT.—Judge Miller will stipulate that these copies are correct, and you further ask him to stipulate that they were delivered.

Mr. GRINSTEAD.—I asked him to stipulate that the various instruments were delivered back and forth as pleaded, regardless of the legal effect.

Mr. MILLER.—I will do that.

Mr. GRINSTEAD.—I was wondering whether we had better introduce the originals or simply let the copies in the pleadings serve as evidence.

Mr. MILLER.—I am willing that the copies in the pleadings shall be considered as evidence.

Mr. GRINSTEAD.—Then we have all of our evidence in with one exception, covering the several affirmative defenses. [369]

The COURT.—If there should ever be an appeal, I suppose the clerk ought to have some sort of an exhibit file-mark on these documents.

Mr. GRINSTEAD.—Then I think that we elect to pull out all of these documents and put them in order here, and hand them in as one exhibit.

The COURT.—Then when the record is made up on appeal,—

Mr. GRINSTEAD.—The original can go down,—

The COURT.—The Clerk, when he came to copy the answer, he would have an incomplete answer?

Mr. GRINSTEAD.—I will follow my pleadings and you will follow the original documents, so that we get them all in.

The first exhibit mentioned is Exhibit "C" in paragraph 3 of the first affirmative defense, being the original application to the American Bonding Company, dated May 1st, 1911, and signed by Mr. Stewart, Mr. Plamondon and Mr. Carothers.

Mr. MILLER.—Yes.

Mr. GRINSTEAD.—I handed the clerk the wrong one. The date of the application pleaded, the bank application, as pleaded, is dated April 27, 1911. The other one was Mr. Stewart's personal application.

Now, Exhibit "D," mentioned in paragraph 4 of the first affirmative defense, signed by the Kelso State Bank by Mr. Plamondon.

In the first affirmative defense we have referred to Exhibit "A," attached to that pleading, which is bond 886,520, the original being in evidence through the testimony of the plaintiff.

The next group of exhibits are the certificates of [370] the Kelso State Bank to the Fidelity & Deposit Company for annual renewals of the bond commencing in April, 1914, down to and including April 28, 1919, six of them. These can go in as part of the same exhibit.

The next document is an application pleaded as Exhibit "K," paragraph 7 of the first affirmative

defense, being a certificate by the president of the Kelso State Bank, under date of April 26, 1920.

The next exhibit mentioned is Exhibit "B," in paragraph 7 of the complaint, being bond 886,520-A with a rider attached, already offered in evidence by the plaintiff. That is the second bond, the 1920 bond.

Mr. MILLER.—You are not introducing that.

Mr. GRINSTEAD.—No, I am simply stating they are already in evidence here. That is all of the evidence that goes in under the first affirmative defense, except what is already in. We demanded of the plaintiff, the original bond to the Kelso State Bank, given by the American Surety Company, and it has been stipulated here that they are unable to produce it, but they do stipulate that such a bond existed and the bank had it originally.

Mr. MILLER.—I do not think it is material, because it was merged in the other bond anyway, the one we have in evidence.

Mr. GRINSTEAD.—We want it agreed that the bond was dated as stated anyway.

Mr. MILLER.—All right, I will do that, we will understand that.

Mr. GRINSTEAD.—We do not have a copy of that. They are conceding that such a bond existed as of the date pleaded [371] and the facts are as pleaded, up to the point where bond 886,520-A, was given.

The COURT.—Are they admitting some specific allegation in your answer?

Mr. MILLER.—It becomes immaterial.

Mr. GRINSTEAD.—Paragraph 3 of our first affirmative defense alleges that on the 27th day of April, 1911, the Kelso State Bank executed and delivered to the American Bonding Company, its original application and so forth. Now he admits the execution and delivery to the Kelso State Bank of the bond of the American Bonding Company that I have referred to, in accordance with those dates, and denies all the legal effects and all the rest of it.

The COURT.—The admission, then, is the execution and delivery of the bond referred to?

Mr. GRINSTEAD.—Yes, on the date and so on.

Mr. MILLER.—That is all right.

Mr. GRINSTEAD.—There is no further documentary evidence in connection with the second affirmative defense. There is no further documentary evidence in connection with the third affirmative defense. The same is true in regard to the fourth affirmative defense.

Now, in the fifth affirmative defense, we plead the giving of the guaranty of May 26, 1919, which is already in evidence, as a part of Defendant's Exhibit 2-A, being the second set of minutes; in other words that guaranty is right in the exhibit along with the minutes of May 26, 1919.

That also covers this defense or partial defense which may be known as the 6th affirmative defense. [372] Now the seventh affirmative defense, it is not numbered that way, but that is what it is, that is the manner in which we pleaded,—that on the

17th of March, 1920, said Kelso State Bank being insolvent, closed its doors and was taken over by Claude P. Hay, Commissioner of Banking,—

Mr. MILLER.—We will admit paragraph 5 of that defense.

The COURT.—Admit paragraph 5?

Mr. MILLER.—We admit paragraph 5 of the last affirmative defense, which is really the 7th.

Mr. GRINSTEAD.—Now, in reference to paragraph 6.

Mr. MILLER.—We admit of this \$64,460,96, which was on deposit, the defendant being one of the sureties from the bank to the county, paid on account of such liability the sum of \$46,163.29 to the county treasurer and took an assignment of the claim, the treasurer assigning all of his rights in the deposit to the company, as to the \$46,000.

Mr. GRINSTEAD.—Now, at that point, if your Honor is taking notes here, please bear in mind that beginning with paragraph 9 of the pleadings, those are all we have up to the subsequent stipulation between counsel, and the new paragraphs, taking the place of everything commencing with paragraph 9, are in a stipulation entered into in July, 1922, between counsel here and said stipulation is on file here.

The COURT.—Paragraph 9 withdrawn?

Mr. GRINSTEAD.—Paragraph 9 withdrawn, and the stipulated paragraphs takes its place, which is an allegation that the Kelso State Bank is indebted to us by reason of those payments in the sum of \$46,163.29, subject to this [373] qualification that

the Kelso State Bank has paid us a dividend of 20 per cent.

Mr. MILLER.—I think it also would be subject to the outcome of that litigation that is now pending in the Circuit Court of Appeals, because if you recovered these warrants, you would not have that big claim,—\$33,000 worth of warrants there.

Mr. GRINSTEAD.—The Court understands this, any way: We paid out \$46,000, the bank administrator has paid us 20 per cent on our claim, but we have accepted the money on the reservations of all rights. Then there is litigation pending now, in the Circuit Court of Appeals between us and the bank, relative to some other securities, which the county treasurer had, or which he did not have,—that is the question there.

The COURT.—Where is the stipulation you are referring to?

Mr. GRINSTEAD.—It is not in the stipulation, counsel just raised that point. I am perfectly willing to state that is the evidence.

The COURT.—He will have to go to the record for that.

Mr. MILLER.—We admit that they presented a claim for that amount, and 20 per cent has been allowed upon it; whether the balance will be due, you will admit, depends somewhat on this other litigation.

Mr. GRINSTEAD.—I think that we will rest.

The COURT.—That is everything but the argument.

Mr. GRINSTEAD.—Yes.

The COURT.—These matters that the witness Adams was going to look up?

Mr. MILLER.—We will let it go. [374]

Mr. GRINSTEAD.—We want these two depository bonds along with the other exhibit, certified copies of our depository bonds with the county treasurer. Put that as part of that other exhibit.

Said depository bonds were received in evidence and marked as Exhibit 38-A.

Mr. MILLER.—During the progress of the trial, I stated to the Court that we would have copies made of a lot of the records that Mr. Adams has testified to, but the stenographer has transcribed, or will transcribe, all of that evidence, and I think it is already in the record. I do not see any necessity of making copies and turning them in. I spoke to Mr. Grinstead to-day about that, and he said unless after he had examined it, it was not complete enough, he would not insist upon us inserting the copies. It is just a copy of the record the witness was reading, and that is all in the stenographer's notes and it will be transcribed.

Mr. GRINSTEAD.—That is after we have read the transcript so that we will know whether the record is complete.

Mr. MILLER.—I am willing to do it, but it is quite a big job and I cannot see that it will be any benefit because it will all be transcribed anyway. The copies of the deposit slips we can put in.

Thereupon the further hearing of this matter was continued until 10:00 o'clock the following morning,

which time, after oral argument, the case was submitted to the Court upon written briefs. [375]

Acceptance of Service of Bill of Exceptions.

We hereby accept service of defendant's proposed bill of exceptions in the above-entitled matter and acknowledge receipt of copy of the same this 30th day of April, A. D. 1923.

MILLER, WILKINSON & MILLER,
Attorneys for Plaintiff. [376]

Stipulation Re Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED, by and between Messrs. Miller, Wilkinson & Miller, attorneys for the above-named plaintiff, and Messrs. Grinstead, Laube & Laughlin and Thomas E. Davis, attorneys for the above-named defendant, that the defendant's proposed bill of exceptions in the above-entitled cause, which was served upon plaintiff's attorneys on the 30th day of April, 1923, together with the exhibits referred to therein, being Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 7, 8, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 23, 24, 25, 27 and 28, and Defendant's Exhibits Nos. 1-A, 2-A, 19-A, 20-A, 21-A, 22-A, 23-A, 24-A, 25-A, 31-A, 37-A, and 38-A contain all of the evidence introduced upon the trial of said cause by either party thereto, except certain evidence which was introduced in support of and in opposition to certain claims alleged in the plaintiff's complaint, which claims either were withdrawn at the trial of the

cause, or the Court found there was no evidence to support the same, and concerning which claims no issue is involved on writ of error or appeal herein.

Dated this 21st day of May, 1923.

MILLER, WILKINSON & MILLER,

Attorneys for Plaintiff.

GRINSTEAD, LAUBE & LAUGHLIN,

And THOMAS E. DAVIS,

Attorneys for Defendant. [377]

Certificate of Judge to Bill of Exceptions.

State of Washington,
County of Pierce,—ss.

I, Edward E. Cushman, Judge of the United States District Court for the Western District of Washington, Southern Division, the Judge before whom the above cause was tried and determined, do hereby certify:

That the foregoing is a true bill of exceptions in the above cause and the same is hereby allowed, settled and signed.

That said bill of exceptions, together with the exhibits referred to therein and hereto attached and made a part hereof contains all of the evidence introduced upon the trial of said cause by either party thereto, except such evidence as pertained to claims which were either waived by the plaintiff or were not supported by the evidence.

Done at Tacoma, this 24th day of May, 1923.

EDWARD E. CUSHMAN,

Judge.

Lodged May 5th, 1923.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 24, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [378]

Assignment of Errors.

Comes now the Fidelity and Deposit Company of Maryland, defendant above named, and assigns the following errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit:

I.

That the Court erred in permitting the witness Adams to testify in substance that when two notes executed by H. D. Phillips in the amount of Fifteen Hundred Dollars (\$1500.00) each, entered the Kelso State Bank on March 20, 1918, a cash item initiated on March 11, 1918, in the amount of Thirty-two Hundred Dollars (\$3200.00) disappeared; and in permitting said witness Adams to testify that when said cash item originated on March 11, 1918, the savings account of F. L. Stewart, Guardian of Henry Dearing, an incompetent, was credited with the sum of Three Thousand Dollars (\$3,000.00).

II.

That the Court erred in permitting the witness Adams to testify in substance that on March 1, 1921, the individual account of F. L. Stewart received a credit of Four Hundred Fifty Dollars (\$450.00) and that a cash item of Twelve Hundred

Fifty Dollars (\$1250.00) disappeared from the records of the bank on March 10, 1921, when a note of the Northwest Transportation Company for [379] Twelve Hundred Fifty Dollars (\$1250.00) entered the bank.

III.

The Court erred in permitting the witness Adams to testify in substance that on March 10, 1921, when a note of the Northwest Transportation Company in the amount of Twelve Hundred Fifty Dollars (\$1250.00) entered the Kelso State Bank, a cash item in the sum of Twelve Hundred Fifty Dollars (\$1250.00) disappeared from the records and that said cash item of Twelve Hundred Fifty Dollars (\$1250.00) originated in the record on the first of March, 1921, on which date, under individual deposits, F. L. Stewart received credit for Four Hundred Fifty Dollars (\$450.00) and the Kelso Farm Company received credit for Eight Hundred Dollars (\$800.00).

IV.

The Court erred in permitting the witness Adams to testify in substance that on October 23, 1920, four warrants in the amount of Five Hundred Dollars (\$500.00) each, belonging to the estate of Phillip Richter, deceased, of which estate F. L. Stewart was administrator, were placed in the assets of the bank by F. L. Stewart and that said F. L. Stewart took credit to his account for the sum of Two Thousand Dollars (\$2,000.00) and that later said Kelso State Bank surrendered said warrants to the estate of Phillip Richter, deceased. [380]

V.

That the Court erred in allowing any recovery on account of notes executed by Frank Shepard.

VI.

That the Court erred in allowing any recovery on the notes executed by the Northwest Transportation Co.

VII.

That the Court erred in allowing any recovery on the note executed by Fritz Kruze.

VIII.

That the Court erred in allowing any recovery on the note of T. P. Fisk.

IX.

That the Court erred in allowing any recovery on the notes of H. D. Phillips.

X.

That the Court erred in allowing any recovery on the notes of the Kelso Farm Co.

XI.

That the Court erred in allowing any recovery on the Richter estate warrants.

XII.

That the Court erred in making finding of fact No. IV.

XIII.

That the Court erred in making finding of fact No. V.

XIV.

That the Court erred in making finding of fact No. IX.

XV.

That the Court erred in making finding of fact No. XI.

XVI.

That the Court erred in making finding of fact No. XIII.

XVII. [381]

That the Court erred in making finding of fact No. XIV.

XVIII.

That the Court erred in making finding of fact No. XVI.

XIX.

That the Court erred in making finding of fact No. XVIII.

XX.

That the Court erred in making finding of fact No. XIX.

XXI.

That the Court erred in its conclusion of law.

XXII.

That the Court erred in refusing to adopt defendant's proposed finding of fact No. IV.

XXIII.

That the Court erred in refusing to adopt defendant's proposed finding of fact No. VIII.

XXIV.

That the Court erred in refusing to adopt defendant's proposed finding of fact No. IX.

XXV.

That the Court erred in refusing to adopt defendant's proposed finding of fact No. XI.

XXVI.

That the Court erred in refusing to adopt that portion of defendant's finding of fact No. XIV reading as follows:

"That the assistant cashier and other officers of the bank knew of said notes and knew that the Northwest Transportation Co. was borrowing from said Kelso State Bank, and ratified said loans."

XXVII.

That the Court erred in refusing to adopt defendant's proposed finding of fact No. XV.

XXVIII.

That the Court erred in refusing to adopt defendant's proposed [382] finding of fact No. XVI.

XXIX.

That the Court erred in refusing to adopt defendant's proposed finding of fact No. XVII.

XXX.

That the Court erred in refusing to adopt that portion of defendant's proposed finding of fact No. XVIII, reading as follows:

"That the notes executed by said Phillips were secured by a mortgage on said farm purchased by Phillips from Stewart."

XXXI.

That the Court erred in refusing to adopt that portion of defendant's proposed finding of fact No. XIX reading as follows:

"That, on January 11, 1921, the board of directors of the Kelso State Bank authorized a loan to F. L. Stewart in the amount of Six

Thousand and No/100 (\$6,000.00) Dollars, and there was no loan made to him or note of his placed in said bank after said date, except said two notes of the Kelso Farm Co.”

XXXII.

That the Court erred in refusing to adopt defendant’s proposed finding of fact No. XX.

XXXIII.

That the Court erred in refusing to adopt defendant’s proposed finding of fact No. XXI.

XXXIV.

That the Court erred in refusing to adopt defendant’s proposed finding of fact No. XXII.

XXXV.

That the Court erred in refusing to adopt defendant’s proposed finding of fact No. XXIII.

XXXVI.

That the Court erred in refusing to adopt defendant’s proposed finding of fact No. XXV. [383]

XXXVII.

That the Court erred in refusing to adopt defendant’s proposed conclusion of law No. I.

XXXVIII.

That the Court erred in refusing to adopt defendant’s proposed conclusion of law No. II.

XXXIX.

That the Court erred in holding that the defendant was not entitled to set off the amount which it had paid the county treasurer of Cowlitz County upon depository bonds executed by it, as surety, and the Kelso State Bank, as principal, against its liability on the cashier’s bond.

That the Court erred in entering judgment in favor of the plaintiff and against the defendant.

That the conclusion of law entered by the Court is not supported by the findings of fact and is contrary to law.

That the judgment entered by the Court is not supported by the findings of fact and is contrary to law.

WHEREFORE defendant prays that the judgment be released and the District Court be directed to enter judgment for the defendant.

GRINSTEAD, LAUBE & LAUGHLIN

And THOMAS E. DAVIS,

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 24, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [384]

Petition for Order Allowing Writ of Error.

The said defendant, Fidelity & Deposit Company of Maryland, a corporation, feeling itself aggrieved by the judgment entered in the above-entitled cause on the 6th day of April, 1923, in favor of said plaintiff against said defendant for the sum of Twenty-five Thousand and No/100 (\$25,000.00) Dollars, together with interest thereon at the rate of six (6%) per cent per annum from the 9th day of September, 1921, and the said plaintiff's costs and disbursements, in which judgment, and the proceedings leading up

to the same, certain errors were committed to the prejudice of said defendant, which more fully appear from the assignment of errors which is filed herein, comes now and prays said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which said defendant shall give upon said writ of error, and that upon the furnishing of said security all further proceedings in this cause be suspended and stayed until the determination of said writ of error by said [385] Circuit Court of Appeals for the Ninth Circuit. And said defendant further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals.

Dated this 24th day of May, A. D. 1923.

GRINSTEAD, LAUBE & LAUGHLIN

And THOMAS E. DAVIS,

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 24, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [386]

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on to be heard in the courtroom of the above-entitled court in the city of Tacoma, Washington, upon the petition of the defendant, Fidelity & Deposit Company of Maryland, a corporation, herein filed, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors also herein filed in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

The Court having duly considered the same does hereby allow the said writ of error prayed for, and it is **ORDERED** that the amount of bond to be given by said defendant be and the same is hereby fixed at Thirty Thousand and No/100 (\$30,000.00) Dollars.

Dated this 24th day of May, A. D. 1923.

EDWARD E. CUSHMAN,

Judge. [387]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 24, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [388]

Supersedeas and Cost Bond.

KNOW ALL MEN BY THESE PRESENTS: That the Fidelity and Deposit Company of Maryland, a corporation, as principal, and Maryland Casualty Company, of Baltimore, Md., a corporation authorized and existing under and by virtue of the laws of the State of Maryland, authorized to become surety on bonds and undertakings required by the laws of the United States, as surety, are held and firmly bound unto John P. Duke, Supervisor of Banking of the State of Washington, liquidating the Kelso State Bank, in the sum of Thirty Thousand and No/100 (\$30,000.00), lawful money of the United States, to be paid to him or his respective successors, for which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our successors and assigns by these presents.

Whereas the above-named Fidelity and Deposit Company of Maryland, a corporation, has prosecuted a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of the District Court of the United States for the Western District of Washington, Southern Division, in the above-entitled cause:

NOW, THEREFORE, the condition of this obligation is such that if the above-named Fidelity and Deposit Company of Maryland shall prosecute its said writ of error to effect, and answer [389] all damages and costs, if it fail to make good its plea, and

abide by and perform whatever decree which may be rendered by said United States Circuit Court of Appeals for the Ninth Circuit, in said cause, or on the mandate of said Circuit Court of Appeals by the court below, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, we have caused this instrument to be signed in our combined names by our respective agents and attorneys, this 24th day of May, A. D. 1923.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND,

GRINSTEAD, LAUBE & LAUGHLIN,
And THOMAS E. DAVIS,

Its Attorneys.

MARYLAND CASUALTY COMPANY.

[Corporate Seal] By I. C. ROWLAND,
Attorney in Fact.

The within bond is approved both as to sufficiency and form, this 24th day of May, A. D. 1923.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 24, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [390]

Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to
the Judges of the District Court of the United
States for the Western District of Washington,
Southern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of the plea which is
in the said District Court before you, between John
P. Duke, Supervisor of Banking of the State of
Washington, liquidating the Kelso State Bank,
plaintiff, and the Fidelity & Deposit Company of
Maryland, a corporation, defendant, a manifest
error hath happened, to the great damage of said
Fidelity & Deposit Company of Maryland, a cor-
poration, defendant, as is said and appears by the
complaint, we being willing that such error, if any
hath been, should be duly corrected and full and
speedy justice done to the party aforesaid in this
behalf, do command you, if any judgment be
therein given, that then, under your seal, distinctly
and openly, you send the record and proceedings
aforesaid, with all things concerning the same, to
the Justice of the United States Circuit Court of
Appeals for the Ninth Circuit at the courtroom of
said court in the city of San Francisco, in the State
of California, [391] together with this writ, so
that you have the same at said place before the
Justice aforesaid on the 23d day of June, 1923, that
the record and proceedings aforesaid being in-

spected the said Justice of said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 24th day of May, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States the one hundred and forty-seventh.

[Seal] F. M. HARSHBERGER,
Clerk of said District Court of the United States,
for the Western District of Washington.

By Alice Huggins,
Deputy.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,
United States District Judge, for the Western District of Washington.

Copy of within writ of error received, and due service of same acknowledged this 24th day of May, A. D. 1923.

MILLER, WILKINSON & MILLER,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 24, 1923. By Ed M. Lakin, Deputy.
[392]

Citation on Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

To John P. Duke, Supervisor of Banking of the
State of Washington, Liquidating the Kelso
State Bank, GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, State of California, on the twenty-third day of June, 1923, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Southern Division, wherein Fidelity & Deposit Company of Maryland, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated this 24th day of May, A. D. 1923.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

[Seal U. S. District Court]

Attest: F. M. HARSHBERGER,
Clerk of Said United States District Court for the
Western District of Washington.

By Alice Huggins,
Deputy. [393]

We hereby this 24th day of May, A. D. 1923, acknowledge service of the foregoing citation, *at the*

MILLER, WILKINSON & MILLER,

Attorneys for Defendant in Error.

Received copy of the foregoing citation lodged with me for defendant in error this 24th day of May, A. D. 1923.

F. M. HARSHBERGER,

Clerk of Said United States District Court.

By Alice Huggins,

Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 24, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [394]

Stipulation for Transmission of Original Exhibits.

In order to save expense, and because of the difficulty in obtaining a satisfactory copy of many of the original exhibits in the above-entitled cause,—

It is hereby stipulated between the undersigned attorneys for the parties in said cause, that none of the original exhibits on file with the clerk need be copied in the transcript of record, but that all such original exhibits shall be transmitted to the clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit.

Dated this 2d day of June, 1923.

MILLER, WILKINSON & MILLER,

Attorneys for the Plaintiff.

GRINSTEAD, LAUBE & LAUGHLIN,

And THOMAS E. DAVIS,

Attorneys for the Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 6, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [395]

Order for Transmission of Original Exhibits.

Agreeable to the written stipulation of the parties this day filed herein, and it being, in the opinion of the presiding judge, undersigned, deemed proper,—

It is hereby ORDERED that none of the original exhibits in the above cause need be copied in the transcript of record, but that all of the original exhibits mentioned in said stipulation, and referred to in the bill of exceptions herein, shall be forwarded by the clerk of this court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit in lieu of copies.

Done in open court this 5th day of June, 1923.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. June 6, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [396]

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled District Court:

For a review of this cause on writ of error sued out by the defendant herein, please prepare, certify and transmit to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, a complete transcript of the record herein, including the following (omitting all captions except that of the complaint and all verifications and acceptances of service etc., except on the citation and writ of error):

1. Complaint.
2. Stipulation amending complaint.
3. Answer.
4. Stipulation amending answer.
5. Reply.
6. Stipulation waiving jury.
7. Opinion of the Court.
8. Findings of fact and conclusions of law proposed by the defendant and filed herein on April 2, 1923.
9. Findings of fact and conclusions of law entered by the Court.
10. Exceptions to the Court's findings of fact and conclusions of law and to the refusal of the Court to adopt the findings proposed by the defendant, and order allowing exceptions.
11. Judgment.
12. Stipulation extending time for preparing and serving bill of exceptions to May 15, 1923.

13. Order extending time for preparing and serving bill of exceptions to May 15, 1923.
14. Bill of exceptions.
15. Assignment of errors.
16. Petition for order allowing writ of error.
17. Order granting writ of error and fixing amount of bond.
18. Bond.
19. Writ of error.
20. Citation.
21. Stipulation for transmission of original exhibits.
22. Order for transmission of original exhibits.
23. This praecipe. [397]

and with said transcript transmit the original writ of error, the original citation, and all the original exhibits introduced on the trial by both parties.

GRINSTEAD, LAUBE & LAUGHLIN,

And THOMAS E. DAVIS,

Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. June 4, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [398]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States

District Court for the Western District of Washington, do hereby certify that the foregoing and within typewritten pages numbered from 1 to 400, inclusive, are a full, true and correct copy of the record and proceedings in the case of John P. Duke, Supervisor of Banking of the State of Washington, liquidating the Kelso State Bank, Plaintiff, *versus* Fidelity & Deposit Company of Maryland, a corporation, Defendant, in Cause No. 3587, in said District Court, as required by praecipe of counsel, filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same, together with all of the original exhibits in said cause, referred to in stipulation between the parties hereto filed June 6, 1923, which original exhibits are transmitted herewith pursuant to the order of the Court so directing, constitutes my return on the annexed writ of error herein.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation in said cause with acceptance of service on each of said writs.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office on behalf of the plaintiff in error for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit [399] in the above-entitled cause, to wit:

Clerk's Fees (Sec. 828, R. S. U. S.) for making record and return, 968 folios @ 15¢ each	145.20
Certificate of Clerk to Transcript of record, 4 folios @ 15¢ each60
Seal to said Certificate20

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 15th day of June, A. D. 1923.

[Seal]

F. M. HARSHBERGER,
Clerk.

By Alice Huggins,
Deputy Clerk. [400]

Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Southern Division, GREETING:

Because of the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, between John P. Duke, Supervisor of Banking of the State of Washington, liquidating the Kelso State Bank, plaintiff, and the Fidelity & Deposit Company of Maryland, a corporation, defendant, a manifest error hath happened, to the great damage of said Fidelity & Deposit Company of Maryland, a corporation, defendant, as is said and appears by the

complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at said place [401] before the Justice aforesaid on the 23d day of June, 1923, that the record and proceedings aforesaid being inspected the said Justice of said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 24th day of May, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States the one hundred and forty-seventh.

[Seal] F. M. HARSHBERGER,
Clerk of Said District Court of the United States
for the Western District of Washington.

By Alice Huggins,
Deputy.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,
United States District Judge for the Western Dis-
trict of Washington.

Copy of within writ of error received and due service of same acknowledged this 24th day of May, A. D. 1923.

MILLER, WILKINSON & MILLER,
Attorneys for Plaintiff.

Received copy of the foregoing writ of error lodged with me for defendant in error this — day of —, A. D. 1923.

_____,
Clerk of Said United States District Court.

By _____,
Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 24, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [402]

Citation on Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

To John P. Duke, Supervisor of Banking of the State of Washington, Liquidating the Kelso State Bank, GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the city of San Francisco, State of California, on the twenty-third day of June, 1923, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Southern Divi-

sion, wherein, Fidelity & Deposit Company of Maryland, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated this 24th day of May, A. D. 1923.

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington.

[Seal] Attest: F. M. HARSHBERGER,
Clerk of Said United States District Court for the Western District of Washington.

By Alice Huggins,

Deputy. [403]

We hereby, this 24th day of May, A. D. 1923, acknowledge service of the foregoing citation *at the*

MILLER, WILKINSON & MILLER,

Attorneys for Defendant in Error.

Received copy of the foregoing citation lodged with me for defendant in error this 24th day of May, A. D. 1923.

_____,
Clerk of Said United States District Court.

By _____,

Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 24, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [404]

[Endorsed]: No. 4048. United States Circuit Court of Appeals for the Ninth Circuit. Fidelity & Deposit Company of Maryland, a Corporation, Plaintiff in Error, vs. John P. Duke, Supervisor of Banking of the State of Washington, Liquidating the Kelso State Bank, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed June 18, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For The Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
a corporation,

Plaintiff in Error,

vs.

JOHN P. DUKE, Supervisor of Banking of the
State of Washington, liquidating the KELSO
STATE BANK,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *District Judge.*

BRIEF OF PLAINTIFF IN ERROR

GRINSTEAD, LAUBE & LAUGHLIN, and
THOMAS E. DAVIS,

Attorneys for Plaintiff in Error.

314 Colman Building, Seattle, Washington.

United States
Circuit Court of Appeals
For The Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
a corporation,

Plaintiff in Error,

vs.

JOHN P. DUKE, Supervisor of Banking of the
State of Washington, liquidating the KELSO
STATE BANK,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *District Judge.*

BRIEF OF PLAINTIFF IN ERROR

GRINSTEAD, LAUBE & LAUGHLIN, and
THOMAS E. DAVIS,

Attorneys for Plaintiff in Error.

314 Colman Building, Seattle, Washington.

United States Circuit Court of Appeals

For The Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF
MARYLAND, a corporation,
Plaintiff in Error,

vs.

JOHN P. DUKE, Supervisor of Bank-
ing of the State of Washington,
liquidating the KELSO STATE BANK,
Defendant in Error.

No. 4048

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *District Judge.*

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

The defendant in error recovered judgment, in the United States District Court for the Western District of Washington, Southern Division, against plaintiff in error in the amount of \$25,000.00, the full penalty of the bonds hereinafter mentioned, together with interest and costs.

On April 28th, 1911, The American Bonding Co.

of Baltimore, as surety, executed a fidelity bond in the penal sum of \$25,000.00 to the Kelso State Bank, of Kelso, Washington, covering one F. L. Stewart in his duties as cashier of said Bank. At the time this bond was given, the Kelso State Bank, in writing, answered certain questions propounded to it by Bonding Company, which answers it was expressly agreed should be warranties and form a part of and be conditions precedent to the issuance, continuance or any renewal of or substitution for the bond above mentioned. A copy of these questions and answers is attached to the answer of plaintiff in error as Exhibit "C" (Record, pages 60-67), and the original is in evidence as part of defendant's Exhibit 38-A.

The bond of The American Bonding Co. was continued in force by annual renewals until May 1st, 1913, at which time the plaintiff in error, having acquired The American Bonding Co., executed its bond, No. 886520, in the penal sum of \$25,000.00, for a period of one year from May 1st, 1913 (Record 45-53; Exhibit 1). This bond was continued in force by annual renewal certificates until May 1st, 1920 (Exhibit 1), when bond No. 886520-A, in the penal sum of \$25,000.00, effective from May 1st, 1920, was executed. (Record 54-58; 401; Exhibit 2).

Upon the execution of bond No. 886520 by the defendant in error, the Bank agreed in writing that said bond was being given upon the representations and conditions of the original statement

furnished to The American Bonding Co. (Exhibit 38-A; Record pages 70, 401, 403).

This bond expressly provides that it is executed in consideration of the statements made by the Bank relative to the cashier, his conduct, duties, employment and accounts, the manner of conducting the business of the employer and other things connected with the issuance of said bond, which statements together with any other statements in writing thereafter made by the employer to the Company relating to any such matters do and shall form a part of the contract or any continuation or continuations thereof and shall be warranties. It is further agreed that any such statements made in writing by the President, or any officer or director of the employer, shall be considered statements of the employer within the meaning of said bond. (Record 46; Exhibit 1).

During each year from 1914 to and including 1919, the Bank, in order to obtain a continuance of bond No. 886520, delivered a certificate to plaintiff in error certifying that the cashier had faithfully, honestly and punctually accounted for all money and property in his control and custody and had always proper securities and funds on hand to balance his account and was not in default to the Bank. (Record 71-78; Exhibit 38-A; Record 401, 403).

Bond No. 886520, covering the period from May 1st, 1913, to May 1st, 1920, was conditioned that the plaintiff in error would, to the extent of the

penalty thereof, reimburse the Bank for such pecuniary loss of moneys, securities or other personal property belonging to said Bank as it should sustain by any dishonest act or acts of the cashier in the performance of his duties as such cashier. (Exhibit 1; Record 45-53).

Bond No. 886520-A, covering the period from May 1st, 1920, was conditioned that the Plaintiff in error would indemnify the Kelso State Bank against loss, not exceeding the penalty thereof, of any money or other personal property through the fraud, dishonesty, forgery, theft, embezzlement or wrongful abstraction of F. L. Stewart, directly or in connivance with others, while in the service of the Kelso State Bank.

The Kelso State Bank was closed by the Banking Department on March 17th, 1921, (Record 149) the cashier disappearing on that date.

On June 9th, 1921, the defendant in error filed a claim with the plaintiff in error listing forty-nine separate transactions wherein it was claimed the Bank had suffered loss by reason of the dishonest and fraudulent acts of the cashier, aggregating the sum of \$54,394.97. (Exhibit 16; Record 129-130).

On October 30th, 1921, the present action was commenced in the State Court by T. H. Adams, a Special Deputy Supervisor of Banking, to recover said sum of \$54,394.97 listed in said claim and, in addition thereto, to recover the additional sum of

\$3550.00 on account of certain transactions regarding which no claim had been filed. (Record 13-14; 131).

The cause was transferred to the United States District Court for the Western District of Washington, Southern Division, and, by stipulation, the present defendant in error was substituted as plaintiff. (Record 15-16).

The complaint alleged the execution of the bonds by the defendant, quoted the provisions of the bonds and alleged that, at various times during the period from 1915 to the closing of the Bank, it suffered pecuniary losses on account of dishonest and fraudulent acts of the cashier, which fraud was alleged to consist in said cashier wrongfully appropriating to his personal or individual account certain sums of money through the giving and renewal of notes, the dates and names of the makers of said notes being specifically stated. (Record 3-15).

To this complaint the plaintiff in error answered, admitting the execution of the bonds and denying the allegations relative to the fraud or dishonesty of the cashier or loss to the Bank. The plaintiff in error pleaded the statements and certificates made by the Bank as forming part of the contract, alleged breach of warranties, breach of the conditions of the bonds and failure on the part of the Bank to observe the promissory warranties contained in the statements and in the conditions of the bonds. (Record 16-36).

As an additional defense and by way of set-off,

the plaintiff in error alleged that, prior to the closing of the Kelso State Bank, said Bank, as principal, and plaintiff in error, as surety, executed to Linus Perry Brown, as County Treasurer of Cowlitz County, two certain depository bonds in the amount of \$40,000.00 and \$10,000.00, respectively, conditioned to guarantee deposits made by said Linus Perry Brown, as County Treasurer, in the Kelso State Bank; that, at the time said Kelso State Bank closed its doors and was taken over by the Banking Department, said Linus Perry Brown had on deposit in said Bank moneys belonging to Cowlitz County in the sum of \$64,460.96, of which amount five-sevenths, or \$46,163.29, was secured by said depository bonds; that plaintiff in error was obliged to pay and did pay said County Treasurer said sum of \$46,163.29; and, by way of set-off, prayed that the amount owing from said Kelso State Bank to plaintiff in error, by reason of the payment of said depository bonds, be set off against any amount which defendant in error might otherwise recover on the cashier's bonds. (Record 36-39; 80-82). The allegations relative to the depository bonds were admitted in the reply (Record 84-86) and at the time of trial (Record 406), and the facts relative to the same are incorporated in the Court's finding of facts. (Record 138).

The original answer, as filed by the defendant, was amended by stipulation (Record 80-82), and the allegations in the original answer from and

after paragraph 9, on page 39 of the Record, were stricken, and in lieu thereof the allegations contained on pages 80-82 were inserted.

By stipulation a jury was waived and the case was tried to the Court. (Record 86). The Court found in favor of the defendant in error, on account of the transactions in connection with sixteen of the forty-seven items listed in the claim filed with plaintiff in error, and further found in favor of the defendant in error in connection with the Richter estate warrants, in the amount of \$2,000.00, no claim for which had been made against the bond prior to the commencement of this action. (Record 129-139). All of the other claims made by defendant in error either were waived at the time of the trial or no evidence was given to support the same. (Record 130). The Court denied plaintiff in error the right of set-off by reason of having paid the County Treasurer on the depository bonds (Record 139), and entered judgment against the plaintiff in error for the sum of \$25,000.00, with interest from September 9th, 1921, and costs and disbursements. (Record 144-145).

The plaintiff in error contends:

1. That it is entitled to set off, against any sum which may be due the defendant in error upon the cashier's bonds, the amount which said defendant in error owes it on the depository bonds.

2. That there was a breach of the warran-

ties and conditions contained in the cashier's bonds preventing any recovery.

3. That all of the transactions on which recovery was allowed were acquiesced in and ratified by the Kelso State Bank.

4. That the evidence does not show dishonesty or fraud on the part of the cashier.

5. That there is no evidence showing any loss to the Kelso State Bank on account of either of the transactions on which recovery was allowed.

ASSIGNMENT OF ERRORS

The plaintiff in error assigns errors as follows:

1. That the Court erred in holding that the defendant was not entitled to set off the amount which it had paid the County Treasurer of Cowlitz County upon depository bonds executed by it, as surety, and the Kelso State Bank, as principal, against its liability on the cashier's bond.

2. That the Court erred in entering judgment in favor of the plaintiff and against the defendant.

3. That the conclusion of law entered by the Court is not supported by the findings of fact and is contrary to law.

4. That the judgment entered by the Court is not supported by the findings of fact and is contrary to law.

5. That the Court erred in permitting the

witness Adams to testify in substance that, when two notes executed by H. D. Phillips, in the amount of Fifteen Hundred Dollars (\$1500.00) each, entered the Kelso State Bank on March 20, 1918, a cash item initiated on March 11, 1918, in the amount of Thirty-two Hundred Dollars (\$3200.00) disappeared; and in permitting said witness Adams to testify that, when said cash item originated on March 11, 1918, the savings account of F. L. Stewart, Guardian of Henry Dearing, an incompetent, was credited with the sum of Three Thousand Dollars (\$3,000.00).

6. That the Court erred in permitting the witness Adams to testify in substance that, on March 1, 1921, the individual account of F. L. Stewart received a credit of Four Hundred Fifty Dollars (\$450.00) and that a cash item of Twelve Hundred Fifty Dollars (\$1250.00) disappeared from the records of the Bank on March 10, 1921, when a note of the Northwest Transportation Company for (379) Twelve Hundred Fifty Dollars (\$1250.00) entered the Bank.

7. That the Court erred in permitting the witness Adams to testify in substance that, on March 10, 1921, when a note of the Northwest Transportation Company in the amount of Twelve Hundred Fifty Dollars (\$1250.00) entered the Kelso State Bank, a cash item in the sum of Twelve Hundred Fifty

Dollars (\$1250.00) disappeared from the records; and that said cash item of Twelve Hundred Fifty Dollars (\$1250.00) originated in the record on the first of March, 1921, on which date, under individual deposits, F. L. Stewart received credit for Four Hundred Fifty Dollars (\$450.00) and the Kelso Farm Company received credit for Eight Hundred Dollars (\$800.00).

8. That the Court erred in permitting the witness Adams to testify in substance that, on October 23, 1920, four warrants in the amount of Five Hundred Dollars (\$500.00) each, belonging to the estate of Phillip Richter, deceased, of which estate F. L. Stewart was administrator, were placed in the assets of the bank by F. L. Stewart and that said F. L. Stewart took credit to his account for the sum of Two Thousand Dollars (\$2,000.00) and that later said Kelso State Bank surrendered said warrants to the estate of Phillip Richter, deceased.

9. That the Court erred in allowing any recovery on account of notes executed by Frank Shepard.

10. That the Court erred in allowing any recovery on the notes executed by the Northwest Transportation Co.

11. That the Court erred in allowing any recovery on the note executed by Fritz Kruze.

12. That the Court erred in allowing any recovery on the note of T. P. Fisk.

13. That the Court erred in allowing any recovery on the notes of H. D. Phillips.

14. That the Court erred in allowing any recovery on the notes of the Kelso Farm Co.

15. That the Court erred in allowing any recovery on the Richter estate warrants.

16. That the Court erred in making finding of fact No. IV.

17. That the Court erred in making finding of fact No. V.

18. That the Court erred in making finding of fact No. IX.

19. That the Court erred in making finding of fact No. XI.

20. That the Court erred in making finding of fact No. XIII.

21. That the Court erred in making finding of fact No. XIV.

22. That the Court erred in making finding of fact No. XVI.

23. That the Court erred in making finding of fact No. XVIII.

24. That the Court erred in making finding of fact No. XIX.

25. That the Court erred in its conclusion of law.

26. That the Court erred in refusing to adopt defendant's proposed finding of fact No. IV.

27. That the Court erred in refusing to

adopt defendant's proposed finding of fact No. VIII.

28. That the Court erred in refusing to adopt defendant's proposed finding of fact No. IX.

29. That the Court erred in refusing to adopt defendant's proposed finding of fact No. XI.

30. That the Court erred in refusing to adopt that portion of defendant's finding of fact No. XIV reading as follows:

"That the assistant cashier and other officers of the bank knew of said notes and knew that the Northwest Transportation Co. was borrowing from said Kelso State Bank, and ratified said loans."

31. That the Court erred in refusing to adopt defendant's proposed finding of fact No. XV.

32. That the Court erred in refusing to adopt defendant's proposed finding of fact No. XVI.

33. That the Court erred in refusing to adopt defendant's proposed finding of fact No. XVII.

34. That the Court erred in refusing to adopt that portion of defendant's proposed finding of fact No. XVIII, reading as follows:

"That the notes executed by said Phillips were secured by a mortgage on said farm purchased by Phillips from Stewart."

35. That the Court erred in refusing to adopt that portion of defendant's proposed finding of fact No. XIX reading as follows:

"That, on January 11, 1921, the board of directors of the Kelso State Bank authorized a loan to F. L. Stewart in the amount of Six Thousand and No/100 (\$6,000.00) Dollars, and there was no loan made to him or note of his placed in said Bank after said date, except said two notes of the Kelso Farm Co."

36. That the Court erred in refusing to adopt defendant's proposed finding of fact No. XX.

37. That the Court erred in refusing to adopt defendant's proposed finding of fact No. XXI.

38. That the Court erred in refusing to adopt defendant's proposed finding of fact No. XXII.

39. That the Court erred in refusing to adopt defendant's proposed finding of fact No. XXIII.

40. That the Court erred in refusing to adopt defendant's proposed finding of fact No. XXV.

41. That the Court erred in refusing to adopt defendant's proposed conclusion of law No. I.

42. That the Court erred in refusing to adopt defendant's proposed conclusion of law No. II.

ARGUMENT

THE COURT ERRED IN DENYING THE RIGHT OF SET OFF.

It is stipulated that, at the time the Kelso State Bank closed, the County Treasurer of Cowlitz County, Washington, had on deposit in said Bank the sum of \$64,460.96, of which sum \$46,-163.29 was secured by depository bonds theretofore executed by the Kelso State Bank, as principal, and the plaintiff in error, as surety; that the plaintiff in error was obliged to and did pay the County Treasurer the sum of \$46,163.29, and that no part of this sum has been paid, except dividends amounting to 20 per cent, leaving a balance of \$36,930.63 owing from the defendant in error to plaintiff in error. (R. 406; 36-39; 80-82; 138).

The plaintiff in error is entitled to set-off, against any sum which might be due defendant in error on the cashier's bond, the amount which said defendant in error owes it on the depository bonds.

The Statutes of the State of Washington relative to counter-claims and set-off are as follows:

“Sec. 265. The counter claim mentioned in the preceding section must be one existing in favor of a defendant, and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract, or transaction set forth in the com-

plaint, as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. *In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."*

"Sec. 266. The defendant in a civil action upon a contract expressed or implied, may set off any demand of a like nature against the plaintiff in interest, which existed and belonged to him at the time of the commencement of the suit. *And in all such actions, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him."*

"Sec. 267. If the plaintiff be a trustee to any other, or if the action be in a name of the plaintiff who has no real interest in the contract upon which the action is founded, so

much of a demand existing against those whom the plaintiff represents or for whose benefit the action is brought, may be set off as will satisfy the plaintiff's debt, if the same might have been set off in an action brought by those beneficially interested."

"Sec. 268. In actions brought by executors and administrators, demands against their testators and intestates, and belonging to defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased."

"Sec. 271½. If the amount of the set off, duly established, be equal to the plaintiff's debt or demand, judgment shall be rendered that the plaintiff take nothing by his action; if it be less than the plaintiff's debt or demand, the plaintiff shall have judgment for the residue only."

Remington's Compiled Statutes of the State of Washington, 1922.

In its opinion, the trial court said:

"The claim of set-off in the instant case is based upon the assigned claims of the County Treasurer to the defendant, made after the closing of the Bank." (R. 97).

In neither the pleadings nor in the argument in the lower court did plaintiff in error base its claim of set-off on assignments made to it after the Bank closed. In its answer, plaintiff in error, after plead-

ing the facts relative to the depository bonds, the closing of the Bank, the amount of County money on deposit at the time the Bank closed, the payment in full of this amount by the two surety companies, of which amount plaintiff in error was obliged to pay and did pay the sum of Forty-six Thousand One Hundred Sixty-three and 29/100 (\$46,163.29) Dollars, specifically alleged:

“That, upon paying said sum to said Linus Perry Brown, as aforesaid, on account of said bonds, said defendant became subrogated to all claims, demands, actions and causes of action which said Linus Perry Brown, as County Treasurer, or said Cowlitz County, the owner of said funds, had against said Kelso State Bank by reason of having said money on deposit in said Bank, as aforesaid; that the right of subrogation related back to the time when this defendant executed said bonds to said Linus Perry Brown, and related back to a time prior to the time when the Kelso State Bank closed its doors and was taken over by said Claude P. Hay, then Bank Commissioner of the State of Washington.” (R. 38).

In the oral argument and in the written briefs in the trial Court, plaintiff in error based its claim of set-off on its right as a surety, having paid an obligation of its principal on a bond executed prior to the closing of the Bank.

The trial Court apparently failed to distinguish between the right of a surety upon paying an obli-

gation for its principal and the right of a volunteer purchasing a claim after the closing of the Bank.

The Bank being insolvent, equity will, regardless of statute, protect the surety to the extent that it will not permit a recovery to be had on the obligation which the surety owes the Bank until the Bank has fully indemnified the surety for the moneys which it has been obliged to pay on account of the suretyship.

Kilby v. First National Bank, 66 N. Y. S. 579;

Blumenthal v. Einstein, 30 N. Y. S. 1126; 32 Cyc. 246;

2 Michie on Banks & Banking, 1073;

21 R. C. L. 1123;

Dudley Lumber Co. v. Nolan Bros. Lumber Co. (Tenn.) 46 L. R. A. (N. S.) 62, and cases cited in notes;

Funk v. Young (Ark.), 5 A. L. R. 79;

Griffin v. Long (Ark.), 131 S. W. 672;

In re Stout, 109 Fed. 794;

In re Dillon, 100 Fed. 627.

Mervin v. Austin (Conn.), 18 Atl. 1029; 7 L. R. A. 84.

This case is entirely distinguishable from cases holding that the debtor of an insolvent bank cannot set off a claim assigned to him after its insolvency. In the instant case, defendant's rights related back to the execution of the bonds, and the defendant, in paying the County Treasurer, was not a volunteer attempting to secure a set-off against the Bank,

but was paying a liability which became fixed when the Bank suspended.

The case of *Kilby v. First National Bank*, 66 N. Y. S. 579, expressly holds that the surety's position is entirely different from that of a debtor who, owing the bank, goes upon the street after the bank's suspension and buys up a claim to which he had no previous relation with the express purpose of using it as an off-set, the Court saying:

"The defendant bank, at the moment when it suspended, owed three accounts which, in this action, are to be deemed then due and payable. It was insolvent and could not pay them, and plaintiff, by express agreement and otherwise, was individually liable to make good every dollar of every deposit. He has the right to treat his responsibility as then accrued and fixed, and could have pursued the Bank for the total amount of all the deposits. *Clute v. Warner*, 8 App. Div. 40, 40 N. Y. S. 392. As a matter of fact, some time was taken to adjust his liability with the parties to whom he was bound to make good the deposits, and to fix and liquidate his individual responsibility in the case of two of them. This, however, was all done in pursuance to and in recognition of a liability which existed at the date of suspension; and, for the purpose of this action, the payments will be deemed to relate back, and to have been made as of that date. *Rice v. Southgate*, 16 Gray, 142. So that, in con-

clusion, we have plaintiff, as of the date when the bank suspended, becoming liable for the amount of three deposits which he was bound to make good when the bank defaulted, and in liquidation of that liability paying the sum of \$3,785.55, which he asks to have off-set on what the bank or its receiver holds against him. It seems to me that he is entitled to this relief; that whether it be regarded that, as a surety for the bank, he has paid up in part these deposits and become subrogated to the rights and claims of those to whom they belonged, or simply that, by the failure and default of the bank, he became liable for a certain amount, which he has liquidated and paid, in either event equity will give him credit upon his indebtedness for his payment thus made. *Blumenthal v. Einstein*, 81 Hun. 415, 30 N. Y. Supp. 1126."

In *Blumenthal v. Einstein*, 30 N. Y. Supp. 1126, cited in the foregoing quotation, the court said:

"In equity a solvent surety is protected from the claims of his insolvent creditor. For example, in case A., who is solvent, owes B., who is insolvent, one hundred dollars, and A. is surety for B. in the sum of two hundred dollars, equity will restrain B. from collecting the one hundred dollars and will compel its application on the debt for which A. is surety."

The rule stated in Cyc. is as follows:

"If, however, the principal or his estate, is

insolvent, equity recognizes the right of the surety to retain any funds of the principal in his hands, even as against an assignee of the principal; and the principal will not be allowed to recover from his surety without first indemnifying the latter."

32 Cyc. 246.

In *Barrett's case*, 46 English Reprint, 1116, cited in foot-note to 32 Cyc. 246, it was held that, while ordinarily the debtor of a bankrupt's estate or an estate being wound up cannot buy up counter claims subsequent to the bankruptcy or the winding-up order for the purpose of making a set-off, it is otherwise where there is an actual ownership of a counter-claim arising in consequence of some anterior matter.

In *Michie on Banking*, the rule is stated as follows:

"Where a party executes a guaranty for the payment of sums deposited in a bank to which he is indebted, which sums are due and payable at the time of the bank's suspension, equity will give him credit on his indebtedness for the payments made because of the bank's failure to do so, whether he is regarded as a surety, and becomes subrogated to the rights and claims of the depositors, or simply that by the bank's failure and default he becomes liable for such sums."

2 *Michie on Banks & Banking*, 1073.

"A sole solvent surety for a hopelessly in-

solvent principal, on indebtedness due before the appointment of a trustee in insolvency, is entitled to set-off his claim for the payment of his debt against the debt due from him to the insolvent, in a suit on them brought by the trustee, although the insolvency was not known when the debt became due and payment by the surety was not actually made until after the trustee was appointed.

“* * * When the holder of a claim not yet due, arising upon contract, becomes insolvent, and transfers the same before maturity, and the debtor at the time of the transfer holds a similar claim, then due, against the assignor, his right of set-off is preserved against the assignee when the latter's cause of action arises; and a surety on the obligation so transferred may enforce the set-off for his own protection if the principal debtor be insolvent.”

21 R. C. L. 1123.

See also:

24 R. C. L. 861, 862 and cases cited;

Stealman v. Atchley (Ark.), 135 S. W. 902;

32 L. R. A. (N. S.) 1060;

Dudley Lumber Co. v. Nolan Bros. Lumber Co., (Tenn.) 156 S. W. 465; 46 L. R. A. (N. S.) 62;

Fishbourne v. Merchants Bank of Port Townsend, 42 Wash. 473; 85 Pac. 38;

- Merwin v. Austin*, (Conn.) 18 Atl. 1029;
 7 L. R. A. 84;
*Puget Sound State Bank v. Washington
 Paving Co.*, 94 Wash. 504; 162 Pac. 870;
Scott v. Armstrong, 146 U. S. 499; 36 L.
 Ed. 1059;
 16 Rose's Notes, 191;
Williams v. Johnson, (Mont.) Ann. Cas.
 1916 D. 595; 144 Pac. 768;
Philler v. Yardley, 62 Fed. Rep. 645;
Re Hatch, 40 L. R. A. 664; 155 N. Y. 401;
Merrill v. Cape Ann Granite Co., Mass. 23;
 L. R. A. 313.

The surety, having paid since the Bank became insolvent, its right of subrogation against its principal relates back to the date of the giving of the bonds which compelled it to make payment to the County Treasurer.

- 25 R. C. L. 1328;
Hardaway v. National Surety Co., 211 U. S.
 561; 53 L. Ed. 321, 327;
Prairie State Bank v. U. S., 164 U. S. 227;
 41 L. Ed. 413;
Henningsen v. U. S. F. & G. Co., 143 Fed.
 810, 814 (C. C. A. 9th Circuit); 208 U. S.
 404; 52 L. Ed. 547;
*First National Bank v. City Trust, Safe
 Deposit & Surety Co.*, 114 Fed. 529 (C. C.
 A. 9th Circuit);
*Wasco County v. New England Equitable
 Insurance Co.* (Ore.) L. R. A. 1918 D
 732; 172 Pac. 126;

Maryland Casualty Co. v. Washington National Bank, 92 Wash. 497;

In re Scofield Co., 215 Fed. 45, 50;

Re P. McGarvy & Son, 240 Fed. 400, 402;

Derby v. U. S. F. & G. Co. (Ore.) 169 Pac. 500.

The right of set-off in favor of sureties is applied as against receivers or assignees of insolvent banks.

Mercer v. Dyer, 15 Mont. 317; 39 Pac. 314;

Funk v. Young (Ark.) 5 A. L. R. 79;

U. S. F. & G. Co. v. Maxwell (Ark.), 237 S. W. 708.

We particularly call the court's attention to the case of *United States Fidelity & Guaranty Company v. Maxwell*, above cited. The authorities are collected in this case both in the majority and in the dissenting opinions. The majority of court denied the right of set-off in that case for the reason that there was no privity between the bank and the surety, the bank not being a party to the insurance policy and there being no relationship of principal and surety. In that case the deposit was covered by an insurance policy to which the bank was not a party, while in the instant case, the bank was the principal on the bond to the County Treasurer and the plaintiff in error was surety.

A surety is to be deemed a creditor of his principal from the time when he enters into the con-

tract of suretyship, and not from the time when he pays the debt of the principal.

Griffin v. Long (Ark.), 131 S. W. 672; Ann.

Cas. 1912 B. 622 and note; 35 L. R. A.

(N. S.) 855;

Danforth v. Robinson (M. E.), 15 Atl. 27;

6 A. S. R. 224;

Kahn v. Bledsoe (Okla.), 98 Pac. 921; 132

A. S. R. 665;

U. S. F. & G. Co. v. Ryan, 24 Wash. Dec.

258; 214 Pac. 433.

For the purpose of fixing the date when the indebtedness of the principal to him, on account of the payment of a note, had its inception, the payment of the note by the surety relates back to the signing of the note.

In re Stout, 109 Fed. 794.

“In an action by an assignee, under a general assignment, upon a debt due his assignor, the defendant can set-off his liability as surety upon bonds of the assignor as guardian and trustee, in which capacity he had converted a portion of the estate thereof to his own use prior to the assignment, for some of which defendant has been compelled, as such surety, to pay and as to the balance of which actions are pending.”

Morrisen v. Noyes, (Wis.) 81 N. W. 860.

A surety, who pays the debts of his bankrupt principal after the adjudication in bankruptcy,

may set-off the amount so paid against his debt to the bankrupt.

In re Dillon, 100 Fed. 627;

Morgan v. Wordell, 55 L. R. A. 33; Mass. 350.

Under the provisions of Section 267, Remington's Compiled Statutes of Washington, 1922, and also in Equity, the set-off should have been allowed.

In the case of *United States Fidelity & Guaranty Co. v. Ryan*, 24 Wash. Dec. 258; 214 Pac. 433, the supreme court of the State of Washington held that the surety is to be deemed a creditor of its principal, at the latest, from the time of the default of the principal. In the lower court in the present case, some contention was made by the defendant in error that the plaintiff in error was not entitled to a set-off in the present action, because plaintiff could not plead an equitable set-off in an action at law. Whether the set-off is legal or equitable is immaterial since the Act of March 3rd, 1915, Section 274 (b), which expressly provides that, in all actions at law, equitable defenses may be interposed by answer, plea or replication, without the necessity of filing a bill on the equity side of the Court. (38 Stat. L. 956).

In the trial court, defendant in error argued that the present action is for damages and sounds in tort. The only cases cited in support of this theory were certain cases arising under the statute of limitations, wherein the courts held that an action could not be brought on a bond after the

statute of limitations had run against the principal obligation. These cases merely held that, since a bond is in the nature of collateral security for the performance of an obligation by the principal, the discharge of the principal obligation bars an action on the collateral security contract. The same rule is applied in actions to foreclose mortgages after the principal debt has been barred by the statute of limitations.

Pratt v. Pratt, 121 Wash; 21 Wash.
Dec. 177; 209 Pac. 535.

This is entirely different from holding that a mortgage or a bond is not a contract, or that an action thereon is not *ex-contractu*. In order to recover on the bond or foreclose the mortgage, it is necessary, in the same suit or in an independent suit, to prove a valid obligation against the principal or on the principal debt. If such an obligation is established, the right to recover on the bond or to foreclose the mortgage exists *because of the contract contained in the bond or in the mortgage*, for, without such contract, there would be no collateral security.

Plaintiff's contention would make defendant a joint tort-feaser. The complaint in this action is based upon the contracts contained in the bonds, executed by the plaintiff in error. It is apparent that plaintiff in error has not committed any tort and that the only claim that the defendant in error can have against plaintiff in error is by virtue of the contracts contained in the bonds.

Edward F. Gerber v. Title Guaranty & Surety Co., 216 Fed. 980;

4 Joyce on Insurance (2nd Ed.) 4672, 4673.

An action on a bond is an action *ex-contractu*, even though the breach arose in the commission of a tort.

State v. Lichtman (Mo.), 168 S. W. 367;

State v. United States Fidelity & Guaranty Co. (Mo.), 115 S. W. 1081;

Leader v. Mattingly (Ala.), 37 So. 270;

Mumford v. Soloman (Ga.), 68 S. E. 1075;

Moore v. State (Ind.), 16 N. E. 836;

Ranger v. Boswinkle (Ind.), 96 N. E. 208;

Midland Co. v. Broat (Minn.), 52 N. W. 972.

See also:

Puget Sound State Bank v. Gallucci, 82 Wash. 445; 144 Pac. 698.

In the case of *State v. Lichtman* (Mo.), 168 S. W. 367, *supra*, the court said:

“This is an action for damages on a judgment bond and, while it requires the commission of a tort to constitute a breach of a contract, nevertheless it is an action *ex-contractu* and not *ex-delicto*, and conceding that plaintiff was entitled to recover, our courts have decided that defendants would have a right to set-off whatever is due them from relator * * *

The claim of the plaintiff in error against the defendant in error, by reason of having paid the

depository bond, is likewise an action arising out of a contract and, under the provisions of Section 265 of Remington's Compiled Statutes of Washington, 1922, constitutes a valid set-off or counter claim.

To deny the right of set-off in the instant case is to announce a doctrine contrary to the decisions of the United States supreme court, of the state courts and of the federal courts, holding that the surety's right, upon payment of its obligation, relates back to the time of the signing of the bond. The denial of such right is also contrary to the well established rule of law that the right of set-off is available to a solvent surety for an insolvent principal in an action by a receiver, an assignee for the benefit of creditors, or a trustee in bankruptcy. It is respectfully submitted that the trial court erred in denying the right of set-off and in refusing to adopt defendant's proposed conclusion of law No. 2. (R. 126).

THE COURT ERRED IN ALLOWING ANY RECOVERY.

Items on which Recovery was allowed.

The court allowed recovery on account of the following transactions:

NOTES OF H. D. PHILLIPS

Date	Amt. of Note.	Amt. of Recovery
March 20, 1918....	\$1500.00	\$1500.00
March 20, 1918....	1500.00	1500.00
March 20, 1918....	550.00	550.00
April 11, 1918....	500.00	500.00

NOTES OF FRANK SHEPARD

April 23, 1920.....	\$1000.00	
July 19, 1920.....	1000.00	
August 13, 1920....	1000.00	
August 13, 1920....	1000.00	
		\$3200.00

NOTES OF NORTHWEST TRANSPORTATION
COMPANY

April 3, 1920.....	\$2500.00	\$2500.00
Sept. 1, 1920.....	5000.00	2104.78
March 10, 1921....	1250.00	1250.00

NOTE OF FRITZ KRUSE

Sept. 10, 1920.....	\$5000.00	\$4880.00
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NOTE OF T. P. FISK

January 19, 1921..	\$6250.00	\$5000.00
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NOTES OF KELSO FARM COMPANY

January 12, 1921..	\$2200.00	\$2200.00
February 15, 1921	3750.00	3750.00

RICHTER ESTATE WARRANTS

November, 1921....	\$2000.00	\$2000.00
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We will consider these transactions in the above order:

Phillips Notes

The claim filed with the plaintiff in error (Ex. 16) shows that Phillips notes, upon which claim is based, entered the Bank on March 20, 1918, April 11, 1918, and April 5, 1919.

The first two items in connection with the Phillips transactions are two notes of \$1500.00 each which

passed into the Bank March 20, 1918. It is alleged in the complaint and in the claim filed that the entire proceeds of these notes were misappropriated by F. L. Stewart. (R. 9-10; Ex. 16). The testimony shows that, when these notes were discounted in the Kelso State Bank, none of the proceeds passed to the credit of F. L. Stewart, but a cash item of some \$3200.00 which was initiated on March 11, 1918, disappeared. It further appears that this cash item had something to do with the estate of Henry Deering and the cannery mortgage. (R. 156-157).

No claim was made or action brought on account of the Dearing estate or the cannery mortgage, and evidence relative thereto was irrelevant, as not pleaded.

State v. Larson, 119 Wash. 259; 205 Pac. 373.

When these two \$1500.00 notes of March 20, 1918, which took up the cash item, entered the Bank, the Bank lost nothing, but it appears that Mr. Stewart was voluntarily protecting the Bank by these two notes on account of some transaction or transactions coming down into the \$3200.00 cash item, as to which no claim was propounded or suit brought. If the Bank lost anything, it was when the cash item originated, but plaintiff in error was not sued upon that item or advised thereof prior to trial.

There was certainly no loss to the Bank or any gain to Stewart when these notes were placed in the

Bank, because the Bank parted with nothing of value and Stewart received nothing of value.

The court allowed full recovery on the note of \$550.00 executed by H. D. Phillips on March 20, 1918. When this note entered the Bank, the sum of \$50.00 was credited to the account of F. L. Stewart. (R. 157-158; Finding of Fact No. 17; R. 137).

The next Phillips item appears to have entered the Bank on April 11, 1918, when a note for \$1500.00 executed by Phillips entered the Bank which renewed a prior note to the same party for \$1000.00 and that \$500.00 was deposited to the account of F. L. Stewart. (R. 158-159).

In paragraph 16 of its findings, the court found that the Bank suffered a loss of Four Thousand Fifty and No/100 (\$4050.00) Dollars through notes given by Phillips. (R. 136). In paragraph 17, relative to the \$550.00 note, above mentioned, the court finds that Fifty and No/100 (\$50.00) Dollars of this amount was credited to the account of F. L. Stewart (R. 137), and no finding is made relative to the disposition of the other Five Hundred and No/100 (\$500.00) Dollars. However, the evidence is that only Fifty and No/100 (\$50.00) Dollars was deposited to the credit of Stewart. (R. 157-158). From finding 17 and from the evidence, it therefore seems that the court erroneously allowed recovery in the amount of \$4050 on the Phillips notes, although intending to allow recovery

for Thirty-five Hundred Fifty and No/100 (\$3550.00) Dollars only.

It appears from the testimony of Mr. Adams (R. 221), the testimony of Mr. Fletcher (R. 288-291) and from the abstract of title (Ex. 24) that all of the Phillips notes were given to Mr. Stewart in part payment of the purchase price of a farm which Phillips bought from Stewart. There is no evidence that the cashier did not consider the notes good or that he was guilty of bad faith in discounting them. Phillips was satisfied with his bargain and renewed the notes from time to time. The Bank took renewals of the notes (R. 204-207), accepted interest on the same, discounted the notes with other Banks, and discounted the renewals with other Banks. A reference to the notes which were introduced in evidence (Ex. 7) will show that the renewal notes now in the possession of the Bank, have been discounted with other Banks. There is no evidence that the proceeds of the Phillips notes were ever withdrawn by Mr. Stewart, or any one else, from the Bank, and, therefore, no evidence of loss.

Frank Shepard Notes

In the claim filed with the plaintiff in error and in the complaint, defendant in error alleged that the Bank suffered loss on account of the Shepard notes, as of the dates said notes entered the Bank, namely: April 23, 1920; July 19, 1920; August 13, 1920. The undisputed evidence showed that, prior to March 5, 1920, Frank Shepard had purchased a

one-half interest in the Northwest Transportation Company from Mr. Stewart for the sum of Fifteen Thousand and No/100 (\$15000.00) Dollars, giving his notes for Fourteen Thousand and No/100 (\$14000.00) Dollars, payable to the Kelso State Bank, and paying One Thousand and No/100 (\$1000.00) Dollars in cash. These notes were fourteen (14) in number, in the principal sum of One Thousand and No/100 (\$1000.00) Dollars each, and entered the Bank on March 5, 1920. (R. 358; Ex. 16) Mr. Stewart received nothing from the proceeds of these notes, the Bank paid nothing for them, and they were used by the Bank in retiring other paper held by the Bank. In acquiring these notes the Bank parted with nothing. (Deft's. Ex. 16). Six of these notes, amounting to Six Thousand and No/100 (\$6000.00) Dollars, were discounted with the United States National Bank of Portland, the Kelso State Bank receiving the proceeds. (R. 360). No claim was filed or complaint made on account of the transactions involving these notes of March 5, 1920. As four of the notes which had been discounted with the United States National Bank of Portland became due, they were not paid by the maker, and Mr. Stewart paid them, each time sending his personal check for \$1000.00 to Frank Shepard in Portland, with instructions to Shepard to pay the note then due and held by the United States National Bank. (R. 360-361). Mr. Shepard, pursuant to instructions, upon receiving each check, took it to the United

States National Bank and paid that Bank the amount of the note then due and interest, paying the interest himself. After each of these payments had been made, Mr. Shepard executed a new note in the amount of One Thousand and No/100 (\$1000.00) Dollars to the Kelso State Bank and, when said new note passed into the Bank, the proceeds thereof were deposited to the credit of Mr. Stewart in the Kelso State Bank, thereby reimbursing him for the amount which he had paid the United States National Bank. (R. 364-365; 132-133). It was on account of these new notes that claim was made and recovery allowed.

Instead of having the Kelso Bank pay its obligations as indorser on the notes discounted to the Portland Bank, the cashier personally paid the same, thereby advancing for the use of the Kelso Bank the amount necessary to pay the notes. When the new notes, executed by the maker of the original notes, entered the Kelso Bank and the proceeds were deposited to the account of Stewart, the Kelso Bank did not pay out anything that it was not, on account of previous transactions, bound to pay, and it was in exactly the same position as if the United States National Bank had returned the original notes and charged the Kelso Bank's account with the same.

Furthermore, these four (4) notes, on which recovery was allowed, were renewed at various times (R. 195-196); interest was paid and accepted on them; they were kept in their proper files in the

Bank; their existence was shown on the books of the Bank; the transactions relating to their entry into the Bank and the credit of their proceeds to the account of the cashier was clearly made of record on the books of the Bank; the officers of the Bank knew of their existence; and the defendant in error, after he had taken possession of the Bank, dealt with them as the property of the Bank, settled with the maker by accepting twenty cents on the dollar, and surrendered the notes to the maker as fully paid. (R. 193-194). This settlement and surrender of the notes was made in spite of the fact that the uncontradicted testimony of the maker of the notes is that, at the time the notes were given, he was worth from Sixty to Sixty-five Thousand Dollars (R. 376), and there is no evidence that he was in a worse condition financially at the time settlement was made than when the notes were executed.

When the original fourteen (14) notes, amounting to Fourteen Thousand and No/100 (\$14000.00) Dollars, came into the Bank, it paid out nothing and, therefore, sustained no loss at that time. When the notes in question came into the Bank and the proceeds were credited to the cashier to reimburse him on payments made by him on the Bank's rediscounted paper, the Bank paid out nothing that it was not legally obligated to pay whether these notes were received or not.

It is submitted that the court erred in allowing any recovery on account of these notes. Further-

more, there is no evidence that Mr. Stewart ever drew out the amount with which his account in the Bank was credited at the time these notes entered the Bank; nor is there any evidence as to what amount his account was credited with at the time the Bank closed. From all that the record shows, it will only require a bookkeeping transaction, if Mr. Stewart was not entitled to this credit, to restore the *status quo* existing prior to April 23, 1920.

Northwest Transportation Company Notes

The Northwest Transportation Company notes, upon which recovery was allowed, are as follows:

Note of April 3, 1920, for \$2500.00.

Note of September 1, 1920, for \$5000.00 on which recovery was allowed of \$2104.78.

Note of March 10, 1921, for \$1250.00 on which recovery was allowed in the amounts of \$800.00 and \$450.00, respectively.

The testimony showed that Mr. Stewart was a stockholder in the Northwest Transportation Company. He personally loaned this company the sum of Twenty-five Hundred and No/100 (\$2500.00) Dollars which was used by the company in purchasing a certain steamboat, known as the "Kellogg." The \$2500.00 note of April 3, 1920, was given by the Northwest Transportation Company to Mr. Stewart as evidence of said company's indebtedness to him on account of this loan. When this note entered the Bank, Mr. Stewart's account was credited with the sum of Twenty-five Hundred

and No/100 (\$2500.00) Dollars. (R. 367, 134).

The note of \$5000.00, out of which recovery was allowed in the sum of Twenty-one Hundred Four and 78/100 (\$2104.78) Dollars, entered the Bank September 1, 1920. Mr. Stewart had advanced his own money to pay bills for the Northwest Transportation Company (Ex. 25-A), which advance amounted to more than the credit taken out of this note. (R. 134). The testimony of Mr. Shepard and the letters in evidence (Ex. 25-A) show that the sum of Twenty-one Hundred Four and 78/100 (\$2104.78) Dollars was deposited to the credit of Mr. Stewart in partial reimbursement to him for moneys which he had advanced to pay debts of the Northwest Transportation Company.

The \$1250.00 note of March 10th was executed by the Northwest Transportation Company to reimburse Mr. Stewart for moneys which he had previously deposited in the Kelso Bank to the credit of said Company. (R. 135). The testimony relative to this note is that the proceeds were not deposited to Mr. Stewart's account, but were used to take up a cash item in the sum of Twelve Hundred Fifty and No/100 (\$1250.00) Dollars which had previously originated. (R. 171-172). There was no claim made in the complaint on account of any loss in connection with this cash item, and, as the Bank parted with nothing when the \$1250.00 note came into the Bank, the Bank did not suffer any loss. All evidence pertaining to the cash item went in over defendant's objection and motion to

strike and was not within the issues of the case. (R. 170-173).

In the claim filed with plaintiff in error (Ex. 16), and in the complaint (R. 12), the only amount claimed on account of the \$1250.00 note, last above mentioned, was \$800.00. There was a claim made for the sum of \$450.00 out of a note of \$2000.00, dated January 19, 1921. (R. 12). Over plaintiff's objections and motions to strike, the court permitted the defendant in error to introduce testimony, showing that the \$450.00 was in connection with the \$1250.00 note of March 10th, instead of the \$2000.00 note of January 19th. (R. 212-213).

All of the Northwest Transportation Company notes, except the \$1250.00 note of March 10th, were renewed from time to time by the Bank. The Bank held a mortgage on the Steamer "Olympian" as security for these notes (R. 266), and defendant in error ratified the transactions by foreclosing the loan, receiving and retaining the proceeds of the sale and not accounting therefor either in his claim or in his complaint. (R. 384).

Fritz Kruse Notes

Plaintiff's notice of claim and action is upon a note of September 10, 1920, in the sum of \$5000.00 of which the notice and complaint charge that Stewart appropriated \$4880.00. Mr. Kruse, as a witness for defendant in error, testified that this note was paid and returned to him (R. 284) and that, about three months later, he gave Stewart two notes of \$2500.00 each (R. 284), which are the

notes in the possession of plaintiff. (Pltf's. Ex. 4).

Under the testimony, these notes are shown not to be renewal of the note sued on, which was paid, and no claim or suit has been propounded or brought on the notes in the Bank's possession.

The note sued upon having been paid, it is submitted that the court erred in allowing any recovery on this item.

T. P. Fisk Note

The T. P. Fisk note is in evidence as plaintiff's Exhibit 3 and has attached to it a contract entered into between Mr. Fisk and Mr. Stewart relative to a certain land deal known as "Shillapoo Lake Project," together with some other papers showing the accounts between the different parties interested in that project and particularly between Mr. Stewart and Mr. Fisk and a copy of a letter from Stewart to Fisk, dated January 24, 1921.

The evidence shows that Stewart, Fisk, Judge McKenney (Fisk's law partner and the Bank's attorney), Judge Miller (attorney for defendant in error), Mr. Wilkinson (Judge Miller's law partner) and a Mr. Crouch, druggist at Kelso, were associated as partners in a land reclamation project based on draining Shillapoo Lake, and that they all thought it a good, conservative project with bright prospects for a considerable profit. (R. 353-354). Stewart had agreed, conditionally, *to cause to be advanced* the moneys necessary to be paid by Fisk. He had actually advanced, for himself and Fisk, \$12,500.00 and wished to transfer Fisk's obligation

to the Bank, and Fisk had agreed to sign the note. (See letter 1/24/21, Ex. 3, and Judge McKenney's testimony as witness for defendant in error. (R. 349, 350, 357).

It is clear that Stewart expected the note to be signed. Fisk is and was a reputable responsible citizen. The Fisk equity in the Shillapoo project, to which the Bank acquired an equitable lien, was then an asset, or at least was so considered by all of them. Stewart probably was too optimistic and too much of a plunger, as testified by Judge McKenney (R. 355-356) to be a safe banker and he should not have entered an unsigned note in the Bank, but it is hard to see any *bad faith or dishonesty* in Stewart's conduct. The Bank acquired an equitable lien in Fisk's share of the Shillapoo project and should have received Fisk's signature.

In its worst aspect, the taking of this credit into Stewart's account in the Bank can be construed to be no more than the giving of credit to Stewart (upon apparently ample security) without express authorization of the directors.

During the years from 1910 to the time the bank closed, the cashier, the assistant cashier, the directors, and other officers of the bank, repeatedly and without express authorization borrowed from the bank (R. 325-339; Exhibits 19-A and 20-A).

Prior loans to the cashier and other officers having been acquiesced in and ratified, the mere taking of the credit on account of the Fisk note cannot be construed as evidence of dishonesty.

Again, the whole transaction was in and upon the records of the Bank from January 19, 1921. It was known to the assistant cashier (the president's son-in-law and representative in the Bank) (R. 345) and the Bank never propounded any claim, notwithstanding the five days' notice requirement of the bond of May 1, 1920 (Pltf's. Ex. 2). Furthermore there is no evidence that the amount credited to Stewart's account was ever withdrawn, and, therefore no evidence of loss.

Kelso Farm Company Notes

The Kelso Farm Company had been a corporation in which Mr. Stewart was a stockholder. He had purchased the interests of the other stockholders, had disincorporated the corporation and was operating it under a trade name. (R. 348). The claim presented to the defendant (Ex. 16) shows that on January 12, 1921, a note executed by the Kelso Farm Company in the principal sum of \$2200.00 was placed in the Bank and the entire amount credited to Mr. Stewart's account, and that, on February 15, 1921, another note of the Kelso Farm Company was placed in the Bank in the amount of \$3750.00 and the entire proceeds deposited to the credit of Mr. Stewart. (R. 136).

It is admitted that the Kelso Farm Company was Stewart's farm and was merely a trade name under which he was operating and that this transaction was a loan credit by the Kelso State Bank direct to Mr. Stewart.

The minutes of the Kelso State Bank (Ex. 2-A)

show that, at a meeting of the directors of the Kelso State Bank held on January 11th, 1921, a loan in the sum of \$6000.00 was authorized to Mr. Stewart, cashier of the Bank (R. 325-326). The \$2200.00 note signed by the Kelso Farm Company was placed in the Bank the following day and the \$3750.00 note later, making a total of \$5950.00, or \$50.00 less than the amount of the authorized loan.

There was no loan made to Stewart after the resolution of January 11, 1921, except the two loans above mentioned.

The notes were a part of the Bank's records from the respective dates on which they entered the Bank, and the assistant cashier had actual knowledge of them. (R. 325).

At the same meeting of the directors which authorized the loan to Stewart, January 11th, 1921, (Ex. 2-A) the entire board was appointed as an examining board, to meet monthly.

The transactions proven consisted only of credits to Stewart on the books of the Bank. There is no evidence that the Bank ever parted with anything, or that Stewart ever drew out the money credited to his account, and therefore no evidence of loss, and certainly authorized borrowings are not evidence of dishonesty.

Richter Estate Warrants

The court allowed recovery on account of four warrants amounting to Two Thousand and No/100 (\$2000.00) Dollars, claimed to have been taken by

the cashier from the assets of the Phillip Richter Estate, of which he was administrator. This transaction occurred on October 23, 1920. No claim was made on account of this transaction, and the suit was commenced more than six months after the death of Stewart. All of the evidence went in over the objection of plaintiff in error, on the grounds that no claim had been made against the bonds on account of this transaction. The court permitted the testimony to go in, with the understanding that it would be ruled upon at the time of final disposition of the case. (R. 176). The evidence shows that the warrants were discounted by Stewart as administrator of the Richter Estate, and Stewart's account was credited with the amount of these warrants. (R. 179). The warrants were sold to the United States National Bank of Portland under a re-purchase agreement and were later returned by defendant in error to the Richter Estate (R. 180). There is no evidence that the Bank ever parted with the amount which was credited to the account of the cashier, or that he ever drew out any money after this transaction occurred.

The bond in force at the time the Richter Estate warrants were taken expressly provided:

“3. In the event of the death of the Employee during the term of this bond, or of his suspension, dismissal, or retirement from the service of the Employer during the said term, this bond shall thereupon terminate without any action on the part of the Surety. The

right to make a claim hereunder shall cease at the end of six months after the termination, expiration, or cancellation of this bond.

“4. Upon the discovery by the Employer of any dishonest act on the part of the Employee the Employer shall at the earliest practicable moment, and at all events not later than five days after such discovery, give written notice thereof to the Surety at its home office. * * * Legal proceedings for recovery hereunder may not be brought until three months have elapsed after such proof of loss has been filed with the Surety.”

It is admitted that the Bank closed on March 17, 1921, that the cashier disappeared or committed suicide on the same day; that no claim was made on account of the transactions in connection with the Richter Estate warrants or notice given to surety within six months after said 17th day of March, 1921.

This item was not included in the claim presented to the Surety by the defendant in error. (Ex. 16).

It is further admitted that no claim was presented to the Surety or notice given of loss on account of these transactions prior to the commencement of the action in the state court. The complaint in this action was served on October 30, 1921, and filed in the state court on December 14, 1921. (R. 15). Under the express provision of the bond above quoted, no recovery should have been allowed on account of the Richter Estate warrants.

Common Law Bonds

The trial court held that the bonds sued on are statutory bonds. The first bond was given several years before the statute was passed. Neither bond refers to the statute nor contains the provisions of the statute.

In the Indiana case of *U. S. F. & G. Co. v. Poetker*, L. R. A., 1917 B. 984, cited by defendant in error in the lower court, the bond contained all of the conditions of the statute and some additional provisions. The court held that the statutory provisions were exclusive.

The supreme court of Washington reached the opposite conclusion in the case of *Puget Sound State Bank v. Gallucci*, 82 Wash. 445; 144 Pac. 698; Ann. Cas. 1916A, 767.

The following from that decision is directly in point:

“Counsel invoke the rules of strict construction applicable to lien statutes, insisting that such rules are applicable by analogy in favor of the surety company in this case. While the decisions do, in a measure, seem to recognize an analogy between lien laws and laws of this nature, and regard such laws as being, in a sense, in lieu of lien laws; yet we must remember that the right of the bank in this case does not rest alone upon the statute; *but that it rests primarily upon contract*. Indeed, the bank’s right would be contractual even though there were nothing before us by which to meas-

ure the surety company's obligation to the bank other than the language of the bonds, although that is the language of the statute. The bonds are no less contracts because they happen to be entered into in pursuance of the statute. *The obligation, therefore, resting upon the surety company is, in its last analysis, a contractual obligation voluntarily assumed by that company.*"

In the case of *Western C. & G. Ins. Co. v. Muskegee County* (Okla), 159 Pac. 655; L. R. A. 1917 B. 977, at page 983, the court said:

"It is true, of course, that, if a bond omitted the statutory obligations, it could not be held to be a statutory bond. In such case, it would be a common-law bond, and would be measured, of course, by the terms of its obligations."

To the same effect, see the following cases:

9 Corpus Juris, 27;

U. S. v. Hodson, 10 Wall 395; 19 L. Ed. 937;

Stepheson v. Monmouth Min. & Mfg. Co.,
84 Fed. 114;

Lowe v. City of Guthrie (Okla.), 44 Pac. 198,
200;

Smith v. Stubbs (Colo.), 63 Pac. 955, 956.

The bonds given in 1911 and 1913 were certainly not statutory bonds as the statute requiring bonds was not passed until 1917. No change was made or attempted to be made in the conditions of the bond given in 1913 and in force in 1917 to make it conform to the Statute. It was continued in force

thereafter in the same manner as before and it is clear that neither the plaintiff in error nor the Bank considered it a statutory bond or attempted to make it comply therewith.

The Statute reads as follows:

“The board of directors of each banking and trust company shall require its active officers and employees and such other officers as they shall designate, each to give a surety bond, in such sum as the board shall specify and the state bank examiner shall approve, conditioned for the faithful and honest discharge of his duties and for the faithful application of all moneys, funds and valuables which shall come into his possession or under his control.”

Sec. 3239, Remington's Compiled Statutes of Wash. 1922; Laws of 1917, page 288, sec. 32.

An inspection of the bonds will show that none of them contain the conditions of the statute or similar conditions. Furthermore, the complaint in this action was not based upon a statutory bond, nor was the legal effect of the bonds pleaded, but the action was based upon the contracts contained in the bonds as written; nor were the bonds defective within the meaning of Sec. 777, Remington's Compiled Statutes, 1922. Said section reads as follows:

“No bond required by law, and intended as such bond, shall be void for want of form or substance, recital, or condition; nor shall the

principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond. (L. '54, p. 219, Sec. 489, Cd. '81, Sec. 749; 2 H. C. Sec. 800)."

There is no contention that the bonds sued upon in the instant case were void for want of form or substance, recital or condition. Nor is there any contention that the bonds are in any manner defective within the meaning of the above statute. Furthermore, there was no attempt made by the defendant in error to plead, in its complaint, a statutory bond.

The bonds were given, and intended by the surety and by the Bank, as common law contractual obligations, and no thought of compliance with the statute entered into their execution.

Breach of Warranties

Before passing upon the application of the cashier for a bond, the American Bonding Company required the Kelso State Bank to furnish it an employer's statement answering certain questions relative to the cashier, his duties and employment and the supervision exercised over his work and acts.

Question number 11 reads as follows:

"In case of applicant handling cash or se-

curities, how often will the same be examined and compared with the books, accounts and vouchers, and by whom?"

This question was answered as follows:

"The cash is examined every night. Securities all inventoried every week by some officer other than himself."

Said statement contained the following provision:

"It is agreed that the above answers shall be warranties and form a part of, and be conditions precedent to the issuance, continuance or any renewal of or substitution for, the bond that may be issued by the American Bonding Company of Baltimore, in favor of the undersigned, upon the person above named."

and was signed:

"KELSO STATE BANK, By F. M. Carothers,
Vice-President."

A copy of said statement is attached to the answer as Exhibit "C," (R. 60-67), and the original is in evidence as part of Exhibit "38-A."

When the bond of plaintiff in error was substituted for that of the American Bonding Company in April, 1913, the Bank executed an employer's certificate, reading, in part, as follows:

"It is agreed that the information previously furnished by the undersigned to the American Bonding Company of Baltimore, Maryland, regarding the above named employe, his duties and employment and the supervision exercised

over the work and acts of the employe, shall be warranties and shall constitute the basis of and form part of the bond, or any continuation or continuations thereof, that may be issued by Fidelity & Deposit Company of Maryland to the undersigned in behalf of the employe whose application appears above."

This certificate was signed "Kelso State Bank, By F. M. Carothers, President."

A copy of said certificate is attached to the answer as Exhibit "D," and the original is in evidence as Exhibit "38-A."

The first bond provides:

"That the Employer, on becoming aware of any act which may be made the basis of any claim hereunder, shall immediately give the Company notice thereof, in writing, by a registered letter, addressed to the President of the Company, Baltimore, Maryland, and shall, within ninety days after its so becoming aware of such act as aforesaid, file with the Company its itemized claim hereunder at its own cost and expense, with full particulars thereto duly sworn to; * * * and this bond shall become void, both as to any existing, or future liabilities thereunder unless the aforesaid notice shall have been given as provided for, and unless claim is filed within the time and manner above specified, * * * Provided that no claim shall be payable hereunder that shall be filed with the Company after the period of

six months from the expiration or cancellation of this bond, or after a period of six months from the death, resignation or removal of the Employee, occurring prior to the expiration or cancellation of this bond. Provided Further, that there shall be no liability on this bond for any dishonest act or acts committed by the Employee after the Employers first becoming aware of any act which may be made the basis of a claim hereunder." (Exhibit No. 1.)

The second bond provides:

"Upon the discovery by the Employer of any dishonest act on the part of the Employee the Employer shall at the earliest practicable moment, and at all events not later than five days after such discovery, give written notice thereof to the Surety at its home office. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the Surety at its home office within three months after such discovery. Legal proceedings for recovery hereunder may not be brought until three months have elapsed after such proof of loss has been filed with the Surety, nor brought at all unless begun within six months after such proof of loss has been filed with the Surety. If any limitation set forth in this condition or in condition numbered 3 above is prohibited by the statutes of the state in which this bond is issued, the said limitation shall be deemed to be amended to agree with the

minimum period of limitation permitted by such statutes.

Upon the discovery by the Employer of any dishonest act on the part of the Employee this bond shall terminate, without any action on the part of the Surety, as to any act committed thereafter by such Employee." (Exhibit No. 2).

Each year, for the purpose of obtaining a renewal of the bond, the Kelso State Bank executed and delivered to the defendant a certificate as follows:

"This is to certify, that since the issuing of the above bond Mr. F. L. Stewart has faithfully, honestly and punctually accounted to me for all money and property in his control or custody as my employe, has always had proper securities and funds on hand to balance his accounts, and is not now in default to me.

KELSO STATE BANK,

By F. M. Carothers, President."

Copies of these annual renewal certificates are attached to the answer as Exhibits "E" to "K," inclusive, and the originals are in evidence as part of Exhibit "38-A."

The evidence shows that, for more than eleven years prior to the time the Bank closed, the cashier, as well as other officers, repeatedly and almost continuously borrowed money from the Bank upon promissory notes. These notes were carried in their proper places as part of the securities of the

Bank and were posted in the note register. A large number of these loans were made after the statute of 1917, prohibiting an officer of a bank from borrowing money from it without authority from the board of directors, became effective. (R. 325-337; Exs. "19-A" and "20-A").

If the Bank observed the warranty contained in the statement to the American Bonding Company relative to making inventory of securities weekly, it knew of these loans. If it did not do so, it breached said warranty, thereby releasing the bond.

If the notes of Stewart were not "proper securities," as certified by the Bank, the Bank was guilty of fraud and misrepresentations in procuring the renewals of the bond executed in 1913 and in procuring the new bond executed in 1920, which was executed in reliance upon a similar certificate dated April 26th, 1920. A copy of this certificate last mentioned is attached to the answer as Exhibit "K" and the original is in evidence as part of Exhibit "38-A."

The president of the Bank, who signed these certificates, must have known of the loans to Stewart and to the other officers, as a glance at the note register would have advised him of such fact. Furthermore, the note register was posted by his son-in-law, the assistant cashier.

If he did not know of the loans, the law will charge him with knowledge of the same, since such knowledge would have been obtained by a superficial examination of the securities or of the note

register, and it was his business to ascertain such facts as a slight examination would have revealed before making a positive statement that the securities were proper.

If these loans were not proper, the Bank knew of that fact many years before it was closed and, under the terms of the bonds, it was its duty to notify the surety at the earliest practicable moment, and at all events not later than five days after it became aware that the cashier was carrying securities which were not proper.

If the cashier "always had proper securities on hand to balance his accounts and was not in default to the Bank," as certified by the Bank, it was because the loans to him had been ratified. If they were not ratified, the certificates were false, and the cashier was in default to the Bank when the certificates were made, and the bond was released because notice of this default was not given as provided by the bond.

If the loans were ratified, there can be no recovery and, if they were not ratified, the warranties and representations contained in the application and in the certificates for renewal were breached or untrue, thus releasing the surety from liability.

Remington v. Fidelity & Deposit Co., 27 Wash. 429;

Kleeb v. Long-Bell Lumber Co., 27 Wash. 648;

Deer Trail, etc., Co. v. Maryland Casualty Co., 36 Wash. 46;

Trinity Parish v. Aetna Indemnity Co., 37 Wash. 514.

“It is made plainly to appear that there was enough to excite inquiry and to charge respondent with the duty of ascertaining the true state of the books, before making a statement that, on a certain date, they were found to be correct, and that cash and securities were on hand to balance them. It is the duty of an employer seeking indemnity insurance to use ordinary care to ascertain the truth of his statements before making them * * * and, while he is not to be charged with a knowledge which could only be discovered by an expert (*Remington v. Fidelity & Deposit Co.*, 27 Wash. 429), he is nevertheless charged with such knowledge as a cursory examination would have revealed.”

Poultry Producers Union v. Williams, 58 Wash. 64 (69);

National Surety Co. v. Western Pacific Railway Co., 200 Fed. 675;

Johnson v. Franklin Insurance Co., 90 Wash. 631;

Goldstein v. National Fire Insurance Co., 106 Wash. 346.

“The failure of a bank, upon its officers being told that its teller was speculating, to notify at once the Guaranty Company which was on the teller’s bond, of such information as it had, will defeat a recovery on such bond

for defalcations after the information was received by such officers where such bond provided that the bank should at once notify the company on its 'becoming aware' that the teller was engaged in speculation or gambling."

Guaranty Company of North America v. Mechanics Savings Bank & Trust Co., for the use of J. J. Pryor, assignee, 183 U. S. 402; 46 Law Ed. 253;

Carstairs v. American Bonding & Trust Co., 116 Fed. 449;

Hunt v. Fidelity & Casualty Co., 99 Fed. 242;

Young v. Pacific Surety Co. (Cal.), 70 Pac. 660;

Willoughby, as receiver of Capital National Bank v. Fidelity & Deposit Co. (Okla.), 85 Pac. 713; 7 L. R. A. (N. S.) 548;

Cherry, as receiver of Capital National Bank v. Fidelity & Deposit Co., 205 U. S. 537; 51 Law Ed. 920 (This affirms *Willoughby v. Fidelity & Deposit Co., supra*);

Dominion Trust Co. v. National Surety Co., 221 Fed. 618.

The president of the Bank had authority to make the representations and warranties made and they are binding on the Bank.

Willoughby v. Fidelity & Deposit Co. (Okla.), 85 Pac. 713; 7 L. R. A. (N. S.) 548; affirmed, 205 U. S. 537; 51 Law Ed. 920.

The syllabus of the case last cited reads as follows:

“In an action upon a contract, the party seeking to recover cannot claim the benefits thereunder, and at the same time repudiate the burden. So in an action against a surety company to recover on the bond of a defaulting bank president, the bond must be construed as a whole, and the plaintiff’s right to recover must depend upon such a construction; and where such bond is issued by a surety company and accepted by the bank, upon the faith of certain statements and representations in writing, made by the assistant cashier of the bank, relative to the conduct, duties, employment and accounts of the defaulting bank president, and such statements so made by the said assistant cashier are, by the terms of said bond, made a part of the bond itself, the bond and statement together form the contract, and they must be construed together and, upon their joint construction, or upon their construction as a whole, must depend the rights and liabilities of the parties thereto; and where the bond is issued by the surety company and accepted by the bank upon the faith of the statement and representations so made by the assistant cashier, the receiver of the bank, later appointed, in an action upon the bond, cannot be heard to repudiate or question the authority of the as-

sistant cashier to bind the bank by his statements and representations concerning the conduct, duties, employment and accounts of the defaulting bank president, and at the same time be allowed to recover upon the bond procured on the strength of the statements and representations so made by the said assistant cashier."

See also:

Warren Deposit Bank v. Fidelity & Deposit Co. (Ky.), 74 S. W. 1111;

Guaranty Company of N. A. v. Mechanics Savings Bank & Tr. Co., 183 U. S. 402; 46 Law Ed. 253.

If an employer makes a false answer, not knowing whether or not it is true, and without having used due diligence and precaution to learn the truth, such an answer is fraudulent and will defeat a recovery when relied upon by the insured.

Fidelity & Deposit Co. of Md. v. Kane (Ky.), 206 S. W. 888.

Non-observance of a promissory warranty vitiates the contract.

Elizey v. Mass. Bonding & Ins. Co. (La.), 77 So. 642;

Hunt v. Fidelity & Casualty Co., 99 Fed. 242;

Kentucky Vermillion M. & C. Co. v. Norwich Union Fire & Ins. Society, 146 Fed. 695 (C. C. A., 9 Circuit);

Bank of Cotton Valley v. McInnis, et al., (La.) 78 S. 727;

Bank of Hardinsburg & Trust Co. v. American Bonding Co. (Ky.), 156 S. W. 394.

In the two cases last above cited, the employer's statements were on forms identical with that furnished by the Kelso State Bank to the American Bonding Co. in the instant case.

In all of the above cases, the court held that failure to perform the promissory warranties contained in the employer's statements or in the conditions contained in the bonds or insurance policies would defeat recovery.

A reference to Exhibit 19-A will show that the cashier of the Kelso State Bank borrowed money from the Bank during each of the years 1910 to 1921 inclusive.

From 1917 it was a felony for an officer of a Bank to borrow money from the Bank without having previously obtained an authorization of the board of directors, yet Mr. Stewart borrowed money from the Bank on two notes, amounting to \$1100.00. In 1918 he borrowed money from the Bank on three notes, amounting to \$2300.00. In 1919 he borrowed money from the Bank on seven notes, amounting to \$11,209.94, and in 1920 he borrowed money from the Bank in the total amount of \$14,000.00. No claim has been made on account of any of these loans, as they were all repaid. There is nothing in the minutes showing any authorization by the board of directors for any of these loans, and the testimony is that there was no authorization for the loans.

These loans were regularly posted in the books of the Bank, the notes were carried in the proper place, and any superficial examination of the Bank's books, records or notes would have disclosed them. If the Bank performed the conditions of the promissory warranties relative to the examination of securities every week by some officer other than the cashier, it knew of these loans. If it did not perform these conditions, it breached the warranties and there can be no recovery. It was the duty of the president of the Bank to make a superficial examination, at least, of the securities and funds, before making the certificates for the purpose of securing annual renewals of the bonds. If he did not make this examination, he was guilty of fraud in certifying something as a fact which he did not know to be a fact. If he did make the examination, he was guilty of fraud in certifying that the cashier had always had proper securities on hand when he knew that the cashier had been carrying his personal notes in the Bank contrary to law.

Hunt v. Fidelity & Casualty Co., 99 Fed. 242, and cases above cited.

As stated by this court, in the case of *Kentucky Vermillion M. & C. Co. v. Norwich Union Fire Ins. Society*, 146 Fed. 695, on page 702:

"The provision in question was made a warranty, and the burden of proof in regard thereto rested upon the plaintiff in error to prove a compliance upon its part with this provision."

There can be no recovery therefore, because of the warranties breached.

Ratification

Defendant in error's argument in the lower court was based upon the theory that Mr. Stewart was borrowing, either directly or indirectly, from the Bank in violation of the statute prohibiting an officer from borrowing money without having first obtained the consent of the board of directors. The only direct loan to him, upon which any claim is made, was the Kelso Farm Company loans, which were expressly authorized. In all of the other cases the loans were made on notes signed by persons with whose credit the Bank apparently was satisfied.

The records of the Bank show that Mr. Stewart had been borrowing money from the Bank continuously from at least as early as 1910; that practically all of the directors of the Bank had been borrowing money at various times, and that the assistant cashier of the Bank had been borrowing money from the Bank a great number of years. (R. 325-337; Ex. 19-A and 20-A). The first and only written authorization of any loan to Stewart was that of January 11, 1921 (Ex. 2-A), and there is no authorization of any loan to the other directors. (R. 325-339; Ex. 2-A).

It is admitted that there was no attempt made by Mr. Stewart at any time to conceal the transactions sued upon in this case, or any other transactions in connection with his management of the

Bank. (R. 236). The notes given by himself to the Bank, during all of these years since 1910, including those sued upon in this case, were always in their proper place among the records of the Bank, and the note register contained a complete history of the various loans which Mr. Stewart, and the other directors and officers, had procured from the Bank over a period of years.

What the officers or directors knew, or by an ordinary examination might have ascertained, is presumed to be within the knowledge of the Bank. All of Stewart's transactions were matters of record on the books of the Bank. When notes were received, the items charged in the complaint were credited on the books to his account. The Bank has sat by, since each of the several transactions, with this knowledge or presumed knowledge, and thereby ratified the transaction, taking the benefit by way of interest and principal payments and collateral security, and renewals, and is now estopped to question the transactions.

“While the acts of an officer may, of course, be ratified by resolution of the board of directors, it is not necessary for the board to act as a board in order to effect ratification, or that the ratification should be shown by the records of the bank. Ratification may be inferred from conduct, such as accepting the benefits resulting from an officer's act, or bringing suit on a note taken or contract made by an officer, or even from mere silence, when the acts are

known, and especially when they are repeated and no dissent within a reasonable time is shown.”

7 C. J. 538.

“A bank may be estopped to deny the authority of an officer to do certain acts, where it has accepted the benefits of such act * * *, or where the directors have acquiesced in a particular course of conduct of which the acts are a part.”

7 C. J. 539.

In the case of *First National Bank of Pullman v. Gaddis*, a Washington decision, the cashier and assistant cashier of the bank had loaned money to a speculative corporation in which both of them were stockholders and the assistant cashier was treasurer. The action was against them individually to recover the amount which had been lost by loans to their corporation. The court held that the loans had been ratified and that there was no liability on the part of the defendants. In the opinion, the court said:

“Even if the Kootenai County Mining & Milling Co. was a speculative corporation and was not entitled to credit in the first instance, and the cashier and assistant cashier of the bank knew that fact, even if they were not authorized to extend credit to the said mining company in the beginning, yet when the directors of the bank knew that credit had been extended and made no objection thereto, the

bank cannot, after five years' dealing with that company, hold the cashier or assistant cashier for the amount which the company may owe the bank at the end of that time. After a course of dealing for such a length of time, where the directors of the bank knew about it, the bank will be held to have ratified the credit."

First National Bank of Pullman v. Gaddis,
31 Wash. 596 (600); 72 Pac. Rep. 460;
Monogahela Coal Co. v. Fidelity & Deposit
Co., 94 Fed. Rep. 732 (737).

In the case of *Roberts v. Washington National Bank*, 11 Wash. 550. 40 Pac. Rep. 225, the receiver of the Washington Savings Bank attempted to recover from the Washington National Bank certain property, or the value thereof, which it was claimed had been fraudulently obtained by the Washington National Bank from the Washington Savings Bank. It appeared that the cashier of the Washington National Bank was the treasurer of the Washington Savings Bank and that, in the transactions, he had acted as agent for both banks. The court held that both of the banks had either expressly, or impliedly ratified his agency and authorized him to transact business in the manner in which it was transacted as agent for both banks.

On page 558 of the opinion, the court states:

"It also abundantly appears therefrom that the transactions between the banks, almost from the day of the organization of the national one, were such as would have been justi-

fied only by such an understanding or agreement. That such was the course of dealing is not very strongly disputed by the respondent, but it is claimed by him that the boards of directors of each of the banks were not shown to have had any knowledge of this course of dealing. It appeared from the practically undisputed proofs that this course of dealing had been continued for two years; that its existence during all of this time would have been shown by an examination of the books of either of the banks, and especially by an examination of those of the savings bank. This being so, we think it must be presumed that the board of directors had knowledge thereof. That even a superficial examination of the books of the savings bank would have shown these transactions, is evident from the proofs, and that it was the duty of the board of directors to make at least a superficial examination many times during this period of two years is a fact of which the court will take judicial notice, and if they did not make it, they or those whom they represent must stand the consequences, and not those with whom the corporation may have had dealings."

In the lower court, defendant in error cited certain cases to the effect that the directors could not ratify the loans made by Stewart, or to Stewart. The cases cited are not in point for the reason that the acts attempted to be ratified in those cases were

acts which were inherently dishonest and could not have been authorized before they were done. The loans to Stewart or to others were all acts which could be authorized by the directors and were, therefore, capable of ratification.

First National Bank of Pullman v. Gaddis,
31 Wash. 596;

3 R. C. L. 455, and cases cited.

A surety company is not liable, under a bond indemnifying a bank against loss from embezzlement by its cashier, for loss resulting from acts authorized, ratified or confirmed by the board of directors, though such transactions were *ultra vires* and beyond the scope of the directors' power to authorize and ratify.

*Citizens' Guaranty State Bank of Hutchins
v. National Surety Co. (Texas)*, 242 S.
W. 488.

Every transaction complained of was ratified, either expressly or by acquiescence, and there can be no recovery.

No Dishonesty

The bonds sued on cover pecuniary loss sustained by reason of any dishonest acts committed by the Cashier.

Whether the transactions complained of constitute "dishonest acts" depends upon the intention of Mr. Stewart at the time—in other words, his state of mind.

Honesty means sincerity and good faith. One may be honest, although mistaken.

Webster's Dictionary.

For instance, to take human life, honestly although mistakenly believing that it is necessary in self-defense, is not murder.

State v. Churchill, 52 Wash. 210; 100 Pac. Rep. 309.

Robinson v. Territory, 85 Pac. (Okla.) 451.

Transactions on the part of Stewart, although involving poor business judgment on his part, are not dishonest unless in the exercise of bad faith.

Clark v. Fidelity & Deposit Co., 73 Wash. 62; 131 Pac. 468.

That Stewart became indebted to the Bank through the giving of notes or the taking of credits from notes of others is no evidence of dishonesty.

Monongahela Coal Co. v. Fidelity & Deposit Co., 94 Fed. 732.

Simple mistake, made without fraud, is not evidence of dishonesty.

Kansas Flour Mills Co. v. American Surety Co., 158 Pac. 1118.

Loans to companies in which Mr. Stewart may have been interested do not constitute a wrongful taking or a conversion.

First National Bank v. Gaddis, 31 Wash. 596 (600); 72 Pac. 460.

Fisher v. Murdock, 13 Hun. (N. Y.) 485.

The evidence conclusively shows that, whatever Mr. Stewart's faults may have been, he was not

endeavoring to cause loss to the Bank. On the contrary, he was making personal financial sacrifices to make good bad paper which it held.

For instance, in his dealings with Frank Shepard, he gave the Bank \$14,000.00 of notes which belonged to him personally, in order to retire worthless paper of the Cowlitz Bridge Co. and the Independent Navigation Co. (Ex. "16").

Again, he personally guaranteed all loans to the Bank to the extent of \$50,000.00. (Ex. "2-A").

In all of the transactions where he took credit in his account, the money was actually due to him from the maker of the note and the application to his account was satisfactory to the maker.

No transaction was covered by the veil of secrecy. Mr. Adams testified, as the books show, that his entries were open and frank and easily followed. (R. 235-236).

Apparently the only evidence of dishonesty is the claimed uncollectibility of the paper itself. All of the claims sued on, as testified by Mr. Adams, were based upon a mere finding upon his part that Stewart had taken credit from loans made by the Bank and such loans had not been paid. (R. 216-218). Such is not the test of dishonesty.

An agent of several insurance companies who deposits collections of the different companies in the bank to his individual account, and checks on it to meet the needs of the business, without any objection by the companies, is not guilty of embezzlement for failing to account for premiums col-

lected and deposited in the bank within a bond given to indemnify one of the insurance companies against such appropriations of money by the agent as amounted to larceny or embezzlement.

The court said:

“He drew on the general fund composing his deposit account for the conduct of his business as a general agent for all the companies. He could not be justly charged with *conscious* wrongdoing, when his principals, by their silent acquiescence in this course of business, gave their sanction to the hazard which it entailed. In this view, the corrupt motive *necessary* to make out a case of embezzlement did not exist.”

Dixie Fire Ins. Co. v. Nelson, 128 Tenn. 70; 157 S. W. 416.

The record is devoid of evidence of any action by Stewart designed or intended to cause the Bank to sustain loss. The liability of plaintiff in error is for his fraud or dishonesty. Bad loans do not constitute dishonesty, and there can be no recovery.

No Loss

Defendant in error has proved no loss sustained.

To warrant a recovery, it was his burden to claim, under the terms of the bonds, and prove a loss—that is, that it parted with moneys through the fraudulent or dishonest conduct of the cashier.

The evidence in this case is confined to the passing of credits to the cashier's ledger account. There is no evidence whatever that these moneys were

ever disbursed, much less is there any evidence that they were disbursed dishonestly or fraudulently, or even for the cashier's personal benefit.

If the bank sustained loss, such loss was sustained when it parted with something of value, that is, money, and, therefore, it should have propounded its claim for such disbursements, as of their several dates and amounts, and, at the trial, have proved these disbursements, and that they constituted a loss to the bank, and that such loss was not authorized or ratified by the bank through its officers or directors.

No such evidence was offered and there can be no recovery.

It is elementary that the basis for recovery on any contract of insurance is a loss to the insured. A loss necessarily implies a deprivation or a damage.

Geo. Birrell, Inc. v. Fidelity & Casualty Co.
(Iowa), 188 N. W. 26, 29.

Bookkeeping credits do not constitute a loss. The loss occurs when the bank parts with something of value. Manifestly the bank parted with nothing when it passed a credit to the cashier's account. It could have rescinded the credit at any time thereafter until the money had been disbursed, if it ever was, by charging his account with a like amount.

State v. Larson, 119 Wash. 259; 205 Pac. 373.

In the Iowa case above cited, the president of a corporation applied the assets of the corporation

to the payment of certain debts of the corporation, which he himself had agreed to pay. The Court held that the application of these assets did not constitute a loss within the meaning of the bond, because the corporation was liable to pay the debts.

The facts in that case are particularly applicable to the facts in the instant case relative to the Frank Shepard notes, except that, in the present case, there is no evidence that the bank ever parted with the money which was credited to the cashier's account in reimbursement of the moneys which he used in paying the obligation of the Kelso State Bank to the United States National Bank.

In the *Larson* case, Mr. Larson, contrary to law, created an overdraft while acting as president of the bank. Thereafter he satisfied the overdraft on his ledger account by giving his note to the bank. The court held that the loss occurred when the overdraft was created by paying checks against his account. There is no difference, in principle, whether the checks are drawn prior or subsequent to the time the credit is entered on the officer's ledger account. The loss occurs when the bank parts with its money, and as to this there is neither claim, pleading nor proof in the present case.

Suppose, for illustration, defendant in error had produced checks against Mr. Stewart's account, showing that all of the credits passed to his account had been disbursed, and suppose further that an

examination of these checks showed that his disbursements were entirely in payment of obligations which the bank itself owed. It is obvious, and within the authority of the Iowa case above cited, that the bank, in such event, sustained no loss, and there could be no recovery. Much less can there properly be a recovery when there is not even proof that the money has been disbursed for any purpose.

Plaintiff in error was entitled, under the terms of its bond, to notice of the disbursements through which it was claimed Mr. Stewart has caused the bank to sustain loss, and to opportunity to investigate the matter of those disbursements prior to the time of trial, so that it might establish, if the facts warranted, that the items were not such as to constitute loss to the bank. The disbursements, if any, made by Mr. Stewart out of his account, for and on account of obligations of the bank, did not constitute loss. Plaintiff in error is entitled to the protection which such a claim and opportunity of proof would afford, and defendant in error cannot avoid this by merely showing proof of credits and avoiding the issue as to the disbursements and their nature.

Variance

In the case of three of Phillips' notes, all of the Frank Shepard notes, and one of the Northwest Transportation Company notes, the Court, over objection of the plaintiff in error, permitted the defendant in error to introduce testimony tending

to show entirely different transactions than those alleged in the complaint.

The complaint alleged that by reason of dishonest and fraudulent acts of the cashier the bank suffered a pecuniary loss of money on account of said cashier's wrongfully appropriating to his personal or individual account, through the giving and renewal of notes of H. D. Phillips, said notes being dated as follows: Two notes in the amount of \$1500.00 each, dated March 20, 1918, and one note in the amount of \$550, dated the same date (R. 9-10). The evidence showed that, when the two notes in the amount of \$1500 each entered the bank, the proceeds were credited to a cash item which originated on March 11th, and that this cash item had been used in some manner in connection with an estate of Henry Dearing, an incompetent (R. 156-157). There was no evidence that the proceeds of these two notes was deposited to the account of the cashier, and the evidence relative to the Henry Dearing estate was not within the issues of the case.

The plaintiff in error had not been advised of any claim on account of any transaction in connection with this estate, either by notice, claim or pleading, and did not have any opportunity to investigate concerning the same.

In the claim filed and in the complaint, it was claimed that Stewart had appropriated to his own use the \$550, the proceeds of the \$550 note of

March 20, 1918 (R. 9-10, Ex. 16). The evidence showed that, when this \$550 note entered the bank, only \$50 was deposited to the account of the cashier, and the other \$500 was deposited to the account of a man by the name of N. E. Que (erroneously copied in the transcript as N. E. Q.) (R. 157-158).

The plaintiff in error was not advised, prior to the time this evidence was given, by notice, claim or pleading that the defendant in error claimed any of the proceeds of this note had any connection with the account of N. E. Que, and was given no opportunity to investigate or meet this evidence.

In the claim filed and in the complaint, it was alleged that Stewart had misappropriated the proceeds of the four Shepard notes dated April 23, 1920, July 19, 1920, and two notes dated August 13, 1920, in the amount of \$1000 each (Ex. 16, R. 11). The evidence showed that the cashier did not receive any benefit from these notes, but that the proceeds were deposited to his account to reimburse him for moneys which he had, immediately prior thereto, advanced to pay obligations of the Kelso State Bank to the United States National Bank (R. 393-365). The testimony further showed that, when the original notes entered the bank, the cashier did not receive anything, but that these notes, together with the proceeds of those discounted with the United States National Bank, were used to retire notes of the Independent Navigation Company in the Kelso State Bank. These

notes of the Independent Navigation Company had been in the bank for as much as two and three years prior to the time the Shepard notes entered the bank (R. 394-396). Over the objection of plaintiff in error, the court allowed evidence tending to show that the original Independent Navigation Company notes, which had entered the bank in 1917 and 1918, were executed by a company controlled by Mr. Stewart. If the bank lost anything, it was when these notes of the Independent Navigation Company entered the bank, some two or three years prior to the time alleged in the complaint and in the claim filed. Of this claim of loss, plaintiff in error was not advised by notice, claim or pleading, and was given no opportunity to investigate or determine whether there had been any loss when the Independent Navigation Company notes entered the bank, or whether they had been given to retire worthless paper held by the bank.

In the claim and in the complaint, it was alleged that Mr. Stewart appropriated \$450 out of the proceeds of a \$2000 note of the Northwest Transportation Company, dated March 10, 1921 (R. 12; Ex. 16). Over objection of the plaintiff in error, the Court allowed evidence that this \$450 was deposited to the account of the cashier out of the proceeds of a \$1250 note of the Northwest Transportation Company (R. 171-174). Of this transaction plaintiff in error was not advised by notice, claim or pleading.

A party cannot allege one state of facts in his

complaint and recover judgment by proof of an entire different state of facts at the trial.

Distler v. Dabney, 3 Wash. 200; 28 Pac. 335;

Clark v. Sherman, 5 Wash. 681; 32 Pac. 771;

Jacobs v. First Nat. Bank, 15 Wash. 358; 46 Pac. 396;

22 Enc. of Pl. & Pr. 527.

In the case of *Jacobs v. First Nat. Bank*, *supra*, the Court said

“It is elementary that a party must prevail according to the case made by his pleading or not at all.”

In 22 Enc. of Pl. & Pr. at page 527, the rule is stated as follows:

“It is a general rule in actions at law that, in order to enable the plaintiff to recover or the defendant to succeed in his defense, what is proved, or that of which proof is offered by the party on whom lies the *onus probandi* must not vary from what he has previously alleged in his pleading; and this is not a mere arbitrary rule, but is one founded on good sense as well as good law.”

It is respectfully submitted that the Court erred in permitting the evidence relative to transactions not pleaded and that there was an utter failure of proof of the transactions pleaded in regard to the foregoing items.

CONCLUSION.

We respectfully submit:

I.

That, since plaintiff in error has paid, as surety, an obligation of the Kelso State Bank, as principal, in excess of the penalty of the bond sued on herein, there can be no recovery against it, in any event, and that therefore the cause should be reversed and ordered dismissed.

II.

That, aside from the claim of set off, there can be no recovery from plaintiff in error because:

(a) The obligation sued on was executed and continued in consideration of certain representations and warranties hereinabove discussed which were either untrue or breached to the prejudice of plaintiff in error, with the result that no liability exists in law upon such obligation;

(b) Each and all of the transactions complained of as causing loss to the Bank were open and aboveboard and of record in the Bank, and either known, or conclusively presumed in law to be known, to the Bank, and have therefore been ratified and affirmed by the Bank;

(c) No dishonesty has been shown in the transactions complained of, but only bad judgment in making loans to others than the cashier, and, the obligation sued on covering only, substantially, dishonest acts, no liability in law rests upon plaintiff in error for the losses so sustained;

(d) The defendant in error neither claimed,

alleged nor proved any items of loss to the Bank, but was content to claim for bookkeeping *credits only*, whereas losses would appear on the books as charges or *debts* for disbursements. In other words, defendant in error claimed, alleged and proved the credits appearing on Stewart's account in the Bank, instead of the disbursements by check, if any, which represented the outflow of the Bank's assets as a loss.

III.

That the trial court, over timely objection of plaintiff in error, permitted evidence of transactions (claimed by defendant in error to have caused the Bank to sustain loss), of which plaintiff in error had no prior information, either by way of claim or pleading, and that such evidence was a variance and such items were improperly allowed, whatever the event of the other aspects of this case; and that therefore the judgment must be reversed, or at least modified.

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THOMAS E. DAVIS,

Attorneys for Plaintiff in Error.

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United States
Circuit Court of Appeals
For the Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
a Corporation,

Plaintiff in Error,

vs.

JOHN P. DUKE, Supervisor of Banking of the
State of Washington, liquidating the KELSO
STATE BANK,

Defendant in Error.

Upon Writ of Error to the United States District Court for the
Western District of Washington, Southern Division.

HON. EDWARD E. CUSHMAN, *District Judge.*

Brief of Defendant in Error

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MARYLAND, a Corporation,

Plaintiff in Error,

vs.

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ing of the State of Washington,
liquidating the KELSO STATE BANK,

Defendant in Error.

No. 4048

Upon Writ of Error to the United States District Court for the
Western District of Washington, Southern Division.

HON. EDWARD E. CUSHMAN, *District Judge.*

Brief of Defendant in Error

STATEMENT

For a number of years prior to the 17th day of March, 1921, the Kelso State Bank was engaged in a general banking business at Kelso, Washington. During this time F. L. Stewart was the cashier of the bank, owned a large share of the stock of the bank

and was the general manager and exercised control over the business affairs of the bank. On the 17th day of March, 1921, the banking department of the state of Washington took charge of the bank and it has since been in liquidation under the laws of Washington. In 1913 a bond was given to the bank by the cashier conditioned to reimburse the bank for all loss which the bank might sustain "by any dishonest act or acts" of the said Stewart in the performance of the duties of his office or employment. This bond was continued in force by annual renewals until April 30, 1920, when a new bond was given, the condition of the new bond reading "against the loss, not exceeding twenty-five thousand (\$25,000.00) dollars, of any money or other personal property (including money or other personal property for which the employer is responsible) through the fraud, dishonesty, forgery, theft, embezzlement or wrongful abstraction of F. L. Stewart, hereinafter called the employee, directly or in connivance with others."

This bond continued in force until the closing of the bank on the 17th of March, 1921. The record will disclose that the bank had been insolvent for a number of years prior to the 17th of March, 1921, and was insolvent when the items involved in this controversy were taken by Stewart. Stewart was familiar with the insolvent condition of the bank.

Under the name of the Kelso Farm Company Stewart borrowed from the bank \$5950.00. \$2200.00 of this loan was made on February 12, 1921, and

\$3750.00 on February 15, 1921. Stewart drew from the bank and used for his own purposes the sum of \$5000.00 on January 19, 1921, known in the record as the Fisk dummy note, and on September 10, 1920, at the solicitation of Stewart one Fritz Kruse gave a note for \$5000.00, which Stewart put in the bank and received the money; no consideration was received for the note, it was given to assist Stewart. All of the foregoing items were made after the last bond was given.

During the year 1920 the bank through Stewart discounted notes of the Northwest Transportation Company to the amount of \$5854.78, and during the same year the bank discounted notes given by Frank Shepard, Stewart receiving sums to the amount of \$3200.00, and during the year 1918 the bank discounted notes given by H. D. Phillips to Stewart amounting to at least the sum of \$3550.00. In addition to these items Stewart as administrator of the Richter estate transferred to the bank four warrants aggregating \$2000.00, which the liquidating officer was forced to return to the Richter estate.

The three items, namely, the Kelso Farm loan, the Kruse accommodation note, and the Fisk dummy note, was money taken directly by Stewart from the bank. The Richter warrant was money taken from the bank by Stewart upon an illegal transfer by Stewart of warrants belonging to an estate of which Stewart was administrator. The other items mentioned were instances where money was taken from

the bank by Stewart on notes in which he was personally and directly interested, and discounted to the bank by him.

The trial court, in effect, held that the money was fraudulently and illegally abstracted from the bank by Stewart at a time when he was the cashier and managing officer of the bank and that the taking of the money by Stewart created a liability under the bonds given by the plaintiff in error. All of these withdrawals of money from the bank by Stewart were made after the passage of the state banking law of Washington in 1917.

Section 3259 of Remington's Compiled Statutes of Washington prohibits any loans to officers or employees of the bank, directly or indirectly, unless a resolution authorizing the same and approved by a majority of the directors at a meeting in which no director, officer or employee to whom the loan is to be made is present, shall be entered in the corporate minutes, and further provides that any officer who shall borrow or shall knowingly permit any of its officers or employees to borrow any of its funds in an excessive amount or in violation of the provisions of this section shall be personally liable and shall also be guilty of a felony.

Under the laws of Washington (Sections 5072-5077 of Remington's Compiled Statutes of Washington) the county commissioners were required to designate certain banks which should become depositaries

of public funds and required banks so designated to furnish a bond to the county treasurer to cover any loss the county might sustain by reason of the failure of the bank. The plaintiff in error here had furnished a bond under the provisions of this law to the county treasurer of Cowlitz county indemnifying the treasurer against loss which might arise through the insolvency of the Kelso State Bank. At the time the bank failed the county had a large sum of money on deposit in the Kelso State Bank. The plaintiff in error paid to the county the sum of \$46,163.29 on account of its liability on the treasurer's bond, and took an assignment of the claim and subsequently presented its claim to the liquidating officer of the bank and has been receiving the dividends paid by the liquidating officer upon its claim.

ARGUMENT

SET OFF

Counsel first complain of the refusal of the trial court to allow the assigned claim of the plaintiff in error growing out of its liability to the county treasurer as an off-set against its liability on the bond of the cashier.

The present suit is an action for damages growing out of the dishonest and fraudulent acts of Stewart and is based on the cashier's bond to the bank. It is an action for damages and sounds in tort.

Where the question of off-sets has come up in connection with insolvency of banks the courts hold that the rights of the parties become fixed as of the time when the bank was taken charge of by the liquidating officer.

Section 266 of Remington's Compiled Statutes of Washington reads, in part, as follows:

"The defendant in a civil action upon a contract expressed or implied, may set off any demand of a like nature against the plaintiff in interest which existed and belonged to him at the time of the commencement of the suit."

In *Yardley vs. Philler*, 17 Sup. Ct. Rep. 835, the Supreme Court of the United States held that the right to a set-off against a receiver of a bank is to be governed by the state of things existing at the moment of insolvency and not by conditions thereafter

created, and the rule is that a debtor of an insolvent bank cannot set off against his debt a claim against it which was assigned to him after its insolvency.

State Bank vs. Spangler, 32 Pa. 474.

Nix vs. Ellis, 45 S. E. 404; 118 Ga. 345.

It is held in *Santleben vs. Frobes*, 43 S. W. 571, that promissory notes given by plaintiff to defendant cannot be set-off in a suit for the recovery of stock, or for judgment for its value, as a liquidated demand cannot be set off against a claim for unliquidated damages.

And in *Louisville-Nashville R. R. Co. vs. Empire State Chemical Co.*, 189 Fed. 174:

“In a statutory action by a railroad company for demurrage the court held that the defendant could not off-set a claim for damages for failure to promptly furnish cars, for the claims must not only be mutual but must be the same character of demand.”

The court will notice in this case that the language of our statute is similar to the distinguishing feature of the case just cited, namely, that demand must be of a like nature.

In 34 Cyc. 678, the rule is given:

“But defendant cannot recoup for matters not connected with the basis of plaintiff’s claim and which are founded upon an independent and distinct contract or transaction. And the mere

fact that by one transaction defendant came under obligation to enter into the other does not make them the same."

And on page 690 of 34 Cyc.:

"Defendant may claim in reconvention damages arising out of the same contract or transaction which affords the ground of suit, whether the agreement be embodied in one instrument or several; but not as a general rule for matters not connected with the subject of plaintiff's action."

And on page 696 of 34 Cyc.:

"Under a large majority of the statutes it has been uniformly held that unliquidated damages cannot be pleaded as a set-off, even though the demand which it seeks to interpose as a set-off becomes liquidated after the commencement of the action in which it is sought to be interposed, and as the rule almost universally followed is that a claim sounding in tort is not the subject of set-off, it follows with greater force that a claim for unliquidated damages sounding in tort is unavoidable as a set-off."

The reverse of this rule would be true, that in an action for damages where the damages are unliquidated there can be no off-set of a claim growing out of an independent, disconnected, non-related matter.

It is our contention that this is an action for damages. In this connection we would call the court's attention to *Westervoldt vs. Morenstecher*, a decision by Judge Sanborn of the Eighth Circuit Court of

Appeals reported in 34 L. R. A. 477. This was an action upon the bond of a cashier of a national bank. Judge Sanborn in passing upon the questions involved used this language:

“This is not an action to rescind any contract and recover back the consideration thereof. It is an action for damages for the breach of the conditions of this bond.”

In 9th Wheaton, 220, in *Walton vs. United States*, an action upon the bond of a receiver of public money, the court said:

“The official bond is not given for the balance due; it is a collateral security for the faithful performance of the official duties of the officer, and was executed long before the existence of the balance claimed.”

The Supreme Court of Washington in 19 Wash. 418, in the case of *Spokane County vs. Prescott*, had occasion to pass upon the nature of the liability of a county treasurer's bond. The question directly before the court was when the statute of limitations would commence to run, whether it should be based upon the malfeasance of the officer or upon the written obligation, and the court held that the liability arose when the officer refused to account for the moneys received by him and that it was not based upon the written bond. This case quotes from *State vs. Conway*, 18 Ohio, 235, in which it is said:

“The actual cause of action is not the execution of the bond (that is more in the nature of

a collateral security); but the cause of action is the misfeasance—the false return. Without proof of the false return there can be no recovery. The action is, in effect, although not so in form, an action against an officer for misfeasance in office.”

And the court holds that the bond was a collateral security for the obligation imposed upon the principal. A number of other cases are cited in this decision.

This decision has been cited with approval in a number of later Washington decisions.

In *Dickman vs. Strobach*, 26 Wash. 558, the Supreme Court of Washington in passing upon a guardian's bond used this language:

“Therefore the foundation of the action is not a violation of the terms of a voluntary contract, but is the wrongs committed by the guardian in the violation of his official duties; and the bond is simply a collateral security for the enforcement of the trust.”

In *State vs. Murphy*, 48 Pac. 628, the court observed:

“The Supreme Court of Kansas, in passing upon this question, very correctly held that the wrongs committed by the sheriff in making the levy and sale were the real and substantial foundation of the plaintiff's cause of action, and that the bond was only a collateral security for the enforcement of such cause of action. The bond did not give the cause of action; the wrongs did.”

In *Ruyus vs. Gruble*, 3 Pac. 518, the Supreme Court of Kansas held:

“When the principal debt or cause of action fails, the security must also fail; and, as we have stated before, a sheriff’s bond is merely a security, collateral to the main cause of action.”

In *People vs. Putnam*, Ann. Cases 1913-E, page 1265, the court will find a note where this question is annotated and a number of decisions cited, recognizing the rule that a bond is simply a collateral security for the performance of some duty.

It is contended by counsel that since the statute permits set-offs in certain cases that therefore the off-set in this case would be statutory and not equitable.

The statute does not undertake to define or determine the character or nature of the relief. It is merely a rule of pleadings permitting in certain instances counterclaims and set-offs, and whether the off-set attempted to be invoked is of an equitable nature or not depends upon the case itself and not upon the fact that the statute permits in certain instances off-sets to be plead. The set-off which the defendant is relying upon in this case is of an equitable nature. The right of off-set arises here solely because of the insolvency of the bank. If the bank had not become insolvent no obligation would have arisen on the part of the defendant to pay the depository bond. The whole matter comes before the court on the question of mutual credits and is of equitable

jurisdiction. Without the statute courts of equity were accustomed to grant relief and the statute merely establishes a rule of pleading and still leaves it within the equity branch of the court.

Counsel have cited a number of cases under this head and we will not undertake to review them in detail but we believe that an examination will disclose that none of them bears upon the question now under consideration. The most of them refer to the question of the rights of a surety as against his principal where payment is made by the surety, what rights the surety has as against the principal and do not refer to the particular matter now under consideration. Some of them are questions of application of payment.

Counsel have cited and seem to rely upon the case of *U. S. Fidelity & Guaranty Co. vs. Maxwell*, a recent decision reported in 237 S. W. 708. In this case the bonding company gave a bond to the bank covering dishonesty of the cashier. It also became surety for a depositor in the bank insuring the depositor against loss in the bank.

There is this difference to be noted between that case and the one now before the court, in this instance the plaintiff in error gave a bond to the county treasurer insuring the county against loss of county funds that might be lost in the bank; in the case referred to the bond was given to a depositor in the bank.

Counsel contend that in this case the bond was

given by the bank to the county treasurer and that the defendant became a surety, and in the case cited the bond was given direct to the depositor by the bonding company.

In the case cited, the court says:

“Appellant (referring to the bonding company) had no claim against the Bank of Blytheville and never acquired any claim until it made good its contract of indemnity after the bank commissioner took possession of the affairs of the bank. There was no concurrence between the respective claims of the bank commissioner as receiver under the bond sued on and the claim which appellant acquired by complying with its contract of indemnity with the Missouri State Life Insurance Company.”

So here, there was no concurrence between the liability on the depositary bond which was paid after the bank was taken charge of by the bank commissioner and the bond sued on. At the time the bank failed and prior thereto there existed a liability against the defendant upon the bond given to protect the bank against the dishonesty of the cashier.

When the dishonesty occurred a cause of action accrued and all of the loss which the bank suffered had occurred before the bank failed, and the right of action was complete before the banking officer took charge. At the time the liability occurred this defendant had no claim of off-set merely because of the fact that it had given a bond to the treasurer; it could

have no claim of off-set until it made good its contract of indemnity and it did not make good its contract of indemnity until after the bank became insolvent, and we contend that it could not relate back so as to make concurrence between the respective claims, for the mutuality of the claims must exist at the time of the failure of the bank.

The court is familiar with the rule in this state that when a corporation becomes insolvent that no creditor can be preferred. If the defendant's claim should be allowed it will make it a preferred creditor, for it will be paid in full so far as this bond is concerned, while the other creditors will only receive the dividends, whatever they may be. The purpose of giving the cashier's bond was to protect the bank from suffering loss, the very purpose for which the bond was given, if defendant's contention should prevail, would defeat the objects for which the bond was taken.

In the case cited in 237 S. W., page 708, the court says:

"The law is well settled that where there is a statute prohibiting preferences in claims against insolvent corporations, claims acquired after insolvency or after the appointment of a receiver cannot be set off against debts owing to the corporation in the hands of the receiver for collection, for if the law were otherwise the statute against preferences could be defeated by the purchase of outstanding claims and having them allowed in full as a set-off. The right of set-off

exists only to the extent of the concurrence of the two claims, and in case of insolvency proceedings under a statute prohibiting preferences the concurrence of claims must have existed before the insolvency occurred and the proceedings were instituted."

While our statute does not in terms prohibit preferences, the Supreme Court has established a rule of law in this state which does prohibit preferences. So here before the plaintiff in error should be allowed a preference it must appear that there is a concurrence of claims which must have existed before the insolvency occurred and proceedings were instituted. The insolvency of this bank, according to the testimony of Mr. Adams, had existed for several years prior to the time the bank examiner took charge. The bond to the county treasurer did not become effective until January, 1921.

In *Sawyer vs. Hoag*, 17 Wallace, 610, the Supreme Court of the United States had occasion to pass upon this question of set-off. In referring to the statute which permits set-offs in bankruptcy matters the court said:

"This section was not intended to enlarge the doctrine of set-off or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it."

The same thing can be said with reference to our statute. It merely puts into statutory form what was previously permitted in legal and equitable actions.

It does not change the fact that one may be legal or equitable; if legal it is legal still, and if equitable it would still be equitable.

The case just cited was a question of whether the indebtedness which a stockholder owed for his stock could be off-set against a debt due him from the company and in passing on that question the court said:

“The debts must be mutual; must be in the same right. The case before us is not of that character. The debt which the appellant owed for stock was a trust fund devoted to the payment of all of the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all of the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.”

That is exactly the situation here. The sum due on the bond to the bank is a trust fund for the benefit of all of the depositors. It does not belong to the bank, it belongs to the depositors. Neither the directors nor officers of the bank would have any right to dispose of that fund after the bank became insolvent in fact. As was said by the court in the case just cited, the demands are not mutual, they are not in the same right, for this fund is a trust fund; there is no question of the insolvency of the bank, no question under the rules followed by the Supreme Court of this

state that all of the property belonging to the insolvent estate is a trust fund to be held for the benefit of all of the creditors.

In *Cook County Natl. Bank vs. United States*, 2 Sup. Ct. Rep. 561, the case from 17 Wallace is cited with approval.

The question here was whether the claim of the United States for moneys deposited in a national bank by the deputy postmaster was a preferred debt, or not, and the court in passing on certain phases of the question said:

“A trustee cannot set off against the funds held by him in that character his individual demand against a grantor of the trust. Courts of equity and courts of law would not allow such an application of the funds so long as they are affected by any trust. It would open the door to all sorts of chicanery and fraud. The fund must be relieved from its trust character before it can be treated in any other character.”

So here, the money coming from the plaintiff in error on this bond is absolutely a trust fund for the benefit of the creditors, and the plaintiff in error is seeking to off-set against that its claim accruing to it from another trust fund belonging to the county.

Quoting further from the last decision,

“This doctrine is well illustrated in the case of *Sawyer vs. Hoag*, 17 Wallace 610,”

and then quoting from that decision,

So we think the conclusion is inevitable that there can be no set-off. There was no mutuality of claims, there was no concurrence of claims, there was no claim of mutuality existing at the time the bank became insolvent. The money due from the defendant on the bond is a trust fund for the benefit of all the depositors and destroys any possible mutuality of claims.

In this connection we would call the court's attention to the fact that the plaintiff in error in this case has presented its claim to the liquidating officer for the sum it paid to the county treasurer and has been receiving dividends upon the claim.

“As a general rule the presentation of a claim against the estate of an insolvent or of a decedent constitutes such an election of remedies as will preclude the subsequent prosecution of an action or suit based on an inconsistent remedial right.”
(20 C. J., page 32.)

And the Supreme Court of Washington held in *Longfellow vs. Seattle*, 76 Wash. 509, that,

“For authority on the proposition that the adoption of one remedy by a person having a choice of remedies bars the right to invoke another, we need not look beyond our own cases.”

In *Clausen vs. Head*, 85 N. W. 1028, in passing on the question of election of remedies the Supreme Court of Wisconsin used this language:

“Having made an election between two

courses with knowledge of the facts he waived the one not chosen."

Quoting further from that decision:

"The doctrine that intent to make a choice between inconsistent remedies is essential to a choice, and that absence of such intent will relieve one from the effect of the rule we have discussed, applied only where action in the first instance was taken in ignorance of the facts. (Citing authorities.) Where knowledge of the facts exists consent is conclusively presumed as a matter of law, and such presumption cannot be affected by any declaration or reservation of a right to take a different and inconsistent course at a subsequent time."

Having elected to accept the dividends with full knowledge of all of the facts the plaintiff in error has irrevocably bound itself to the choice of continuing the relation of debtor and creditor. The court will notice a distinction in the cases where claims have been presented and later withdrawn and instances where claims have been presented and dividends accepted. Here the claim was presented, no effort has been made to withdraw the claim and the plaintiff in error has continued to accept dividends upon its claim. In this connection we would call the court's attention to the case of *Potts vs. Schumacker*, reported in 35 L. R. A. 392.

ITEMS ON WHICH RECOVERY WAS ALLOWED

The court found that the bank had suffered a loss through notes given by H. D. Phillips to the amount of \$4050.00.

The proof established that Phillips purchased a supposed equity in a tract of land near Vancouver, Washington, that was mortgaged for a large sum at the time he purchased it and that he gave a second mortgage to Stewart and that the two mortgages combined equaled the full value of the property. None of the notes represented by any of the mortgages are included in the notes in controversy here.

In addition to giving the mortgage Phillips gave Stewart a large number of notes running into thousands of dollars, some of the notes being made directly to the bank and others to Stewart, but all handled by Stewart. There is no evidence as to what the notes were for or whether there was any consideration for them. Stewart took the notes and turned them in to the bank in one form or another, whether he did it in the form of taking the cash out of the bank and carrying it for a time and then putting in the Phillips notes to take care of it is not material. The fact is Stewart used these Phillips notes for abstracting money from the bank, it was the personal deal of Stewart with Phillips and these notes were evidently procured for the purpose of enabling Stewart to draw money from the bank. In any

event, that is what happened. He knew the value of the land that he sold to Phillips, he knew the Phillips notes were worthless, in addition to that the bank at that time was insolvent according to the testimony and neither he nor the directors were authorized to deal with the funds of the bank in that manner.

On page 231 of the transcript the court will find where Stewart took credit for what is designated as the Henry note in the sum of \$3879.50, less an old Henry note for \$2000.00 and interest and revenue, leaving a net amount of \$1870.16, and on the same page of the transcript it appears that on January 28, 1915, among the deposit slips was a credit to F. L. Stewart of a Henry note of \$2000.00, and on page 232 of the transcript it appears that the Henry note for \$3879.50 was sold by the Kelso State Bank to the American National Bank of San Francisco, and on November 19, 1915, the Kelso State Bank received the note back from the American National Bank and credited that bank with the sum of \$3879.50. On page 233 of the transcript on the same date the guardianship account of F. L. Stewart, guardian of Henry Deering, incompetent, is charged with the sum of \$3879.50. The Henry note, so far as the record discloses, disappears, and the Deering estate was not reimbursed from that day forward except for small deposits, until March 11, 1918. The court will thus see that the Henry note belonged to Stewart and was endorsed and discounted to the bank by Stewart and Stewart was given credit for it, and that after the

San Francisco bank had been unable to realize on the note and returned it to the Kelso State Bank that Stewart then undertook to make the records of the bank balance by taking an equal amount from the Deering estate and charging the Deering estate with that amount and the Deering estate remained in that condition until March 11, 1918, except for a few small deposits; that on March 11, 1918, there was initiated in Stewart's cage book a cash item of \$3200.00 resulting from Stewart withdrawing from the bank on that date the sum of \$3200.00 and using it for some purpose and the amount was then carried from day to day as a cash item or as the proverbial "I. O. U.," which was merely a fiction to make his cash balance. On that date, March 11, 1918, the deposit ticket of F. L. Stewart reads, "Cannery mortgage \$3200.00, Loaned Deering \$3000.00, Net \$200.00." On page 230 of the transcript it appears that on March 11, 1918, the guardianship account of Henry Deering was credited with \$3000.00. This cash item of \$3200.00 is carried from day to day until March 20, 1918, when two notes of H. D. Phillips, each for \$1500.00, were discounted to the bank and the cash item went out, Stewart putting in in addition to the notes his individual check for \$200.00, as shown on page 230 of the transcript. It appears from this that Stewart originally had acquired possession or ownership of the Henry note, that he discounted this to the bank and received credit for the full amount of its face value; the bank negotiated the

note to the California bank but later received it back and credited the California bank with the amount and in order to meet this liability and make his books balance Stewart drew from the Deering estate for which he was guardian and placed that amount in the bank; later, in order to settle with the Deering guardianship matter he took from the bank cash and carried it as cash items until the Phillips notes came in, when they were turned in to the bank for \$3000.00 and Stewart gave his own check for \$200.00 and the cash item was eliminated. The Phillips notes were worthless and grew out of a transaction that Stewart had with Phillips, the bank losing \$3000.00 through this manipulation of Stewart's.

The court found the total liability on account of the Phillips notes was the sum of \$4050.00.

We think an error has occurred in the amount of these Phillips notes. The finding of a note of H. D. Phillips for the amount of \$550.00 of date March 20, 1918, should be for \$50.00. It appears from the transcript (pp. 157-158) that this note was for \$550.00 and was handled by Stewart, but Stewart only took credit personally for \$50.00 of the amount, the other \$500.00 mentioned in the findings was discounted by Stewart to the bank and Stewart took credit for the full amount; this will be found on pages 158-159, making a total charge on account of the Phillips notes of \$3550.00, instead of \$4050.00, as found by the court.

FRANK SHEPARD NOTES

The court will find by reference to the testimony of Frank Shepard (transcript pp. 358-377) that Frank Shepard purchased from Stewart a half interest in the Northwest Transportation Company, agreeing to give him \$15,000.00 for a half interest, giving him \$1000.00 cash and fourteen notes for \$1000.00 each. He was dealing entirely with Stewart and had no dealings with the bank, and these were the only notes given by Shepard to Stewart or to the bank, except renewals, and are some of the notes involved in this controversy. The notes may have run directly to the bank but were the notes which Stewart received from the sale of his interest in the Northwest Transportation Company, the blank forms of the bank merely being used in the making of the notes.

On March 5, 1920, a note given by the Independent Navigation Company for \$7500.00 was taken up from the proceeds of the Frank Shepard fourteen notes on that date (transcript p. 396). The Independent Navigation Company was another company operated and controlled by Stewart as appears from the testimony of W. F. Magill (transcript pp. 250-280), referring particularly to pages 266, 273 and 274 of the transcript. The Independent Navigation Company note, as appears from the testimony of Dunham (pp. 394-396) was a Stewart note, Stewart getting the proceeds of the original note for \$500.00 and at each subsequent renewal for a larger amount

the difference was credited to Stewart, and in this connection we would call the court's attention to the testimony of Dunham (p. 395) that Stewart was reimbursed for the \$2160.00 which he temporarily applied to the Cowlitz Bridge Company indebtedness.

Of the \$14,000.00 represented by the fourteen Shepard notes that were turned in to the Kelso State Bank, \$7500.00 and interest to the amount of \$376.67 was used to take up the Independent Navigation Company note, which was a Stewart note; \$2160.00 was used to take up temporarily a Cowlitz Bridge note, which was later reimbursed to Stewart by the Cowlitz Bridge Company, as shown on page 395 of the transcript, and Stewart was credited with the balance of the \$14,000.00. This establishes that he got the benefit of the whole \$14,000.00 of the Shepard notes.

Of the notes that the bank took in, \$6000.00 was transferred to the United States National Bank of Portland; these notes were renewed from time to time as appears from the testimony of Frank Shepard (pp. 358-377); some of these renewal notes were later discounted to the Kelso State Bank and constituted the \$4000.00 note involved in this controversy. Pages 162-164 of the transcript show that these notes were again turned in to the bank and that Stewart got credit for them.

On page 196 of the transcript the notes referred to on pages 162-163 are traced into the notes which

were admitted in evidence and which were found among the assets of the bank when the liquidating officer took charge. The liquidating officer received on the \$4000.00 note a 20 per cent dividend from Shepard, leaving a balance of \$3200.00 which the bank lost and which occurred through the Shepard notes as manipulated by Stewart.

NORTHWEST TRANSPORTATION COMPANY NOTES

It will appear from the testimony of Mr. Magill (transcript pp. 250-280) that Stewart owned the stock of the Northwest Transportation Company and was the active manager of the affairs of the company. He sold an interest in it to Shepard and the company was operated by Stewart and Shepard (see also testimony of Shepard pp. 358-377). During all of the time involved here Stewart was the active manager of the corporation and was thoroughly familiar with its business and financial affairs.

Counsel on page 39 of their brief admit that the testimony established that Stewart was a stockholder in the Northwest Transportation Company and they admit that the \$2500.00 found by the court was for money which Stewart loaned to his own company, taking its note, and then discounting the note to the bank, Stewart getting the money for the note and the bank losing the \$2500.00. This transaction was in direct violation of the law, was in effect an abstraction of the funds of the bank by Stewart, and falls clearly within the inhibitions of the banking act as

well as constituting an embezzlement of the funds of the bank under the decision of the Supreme Court of Washington in *State vs. Larson*, 22 Wash. Dec. No. 10, p. 471.

The \$5000.00 note, of which \$2104.78 was charged against the plaintiff in error, was of the same character. It was given to Stewart by himself as a representative of the corporation, and for money which Stewart had advanced to the credit of his own company, and was discounted to the Kelso State Bank, Stewart getting the money and the bank losing it.

Counsel state in their brief, on page 41, that the bank held a mortgage on the Steamer "Olympian" as security for these notes. Counsel were not justified in making that statement. There is nothing in the record to justify it, and it was not true. The bank held no security for the notes involved in this controversy. It held security on the steamer "Olympian" for a \$5000.00 note given by the Northwest Transportation Company, which was closed at a loss of about \$2700.00, as shown on page 384 of the transcript.

It further appears from the testimony of Mr. Adams (pp. 384-5) that the bank held notes of the Northwest Transportation Company at the time it went into liquidation, amounting to \$12,750.00, and that a number of notes of that company came into the bank subsequent to the closing of the bank which have been sold with recourse, aggregating altogether

\$19,750.00. The bank has realized \$2300.00 on the steamer "Olympian" and will suffer a total loss on the balance, except what may be recovered in this litigation.

THE FRITZ KRUSE NOTES

Fritz Kruse testified (transcript pp. 282-287) that he gave a note to either Stewart or the bank for \$5000.00. He stated that it was given at the request of Stewart and without consideration for the purpose of helping Stewart. This note was discounted by Stewart to the bank, as will appear from the testimony of Mr. Adams (pp. 159-160), and Stewart received credit for \$4880.00. According to the testimony of Mr. Kruse (pp. 284-285) about three months after the giving of the \$5000.00 note the \$5000.00 note was surrendered to him and he gave two notes to Stewart, each for the sum of \$2500.00. The court will find on pages 189-190 of the transcript referring to these notes that the \$5000.00 note of Fritz Kruse was renewed by the giving of two \$2500.00 and these two \$2500.00 notes are the ones that were admitted in evidence in this case and found among the papers of the bank when the examiner took charge. Mr. Kruse testifies that he paid nothing on any of these notes. Counsel contend that the \$5000.00 note was paid. The bank received nothing. Stewart had received \$4880.00 in the beginning, and when the \$5000.00 note became due it was renewed by the giving of the two notes for \$2500.00 each; the bank received nothing and Kruse paid nothing.

THE T. P. FISK NOTE

The facts about this note are that Stewart had an agreement with Fisk to carry Fisk's interest in a certain investment. This agreement was admitted in evidence and is one of the exhibits in this case. Under that agreement it appears that Fisk had no money to go into the deal and that it was agreed that Mr. Fisk should have a one-sixth interest in the project, provided he could raise the money, and Mr. Stewart agreed to furnish the money and they would divide the profits. There was no understanding that Fisk was to furnish any of the money but it was to be furnished by Stewart. When the bank failed a note made out by Stewart was found among the papers of the bank with Fisk's name upon it, but it is conceded that it was not signed by Fisk.

It appears from the testimony of Judge McKenney that Stewart shortly before the bank failed wanted Fisk to sign the note and he refused to do it. On page 350 of the transcript Judge McKenney testified as follows:

“Q. You wrote the agreement or did Fisk write it?

A. I do not remember at this time.

Q. After that agreement which is in evidence was made, did you hear any conversations between Stewart and Fisk?

A. I did.

Q. What were they?

A. Stewart was insisting that Mr. Fisk come to the bank and give his note for that amount of money which Fisk refused to do and they had practically a quarrel over it and Mr. Fisk went away very angry about it, and he came back and renewed it afterwards. Fisk finally told him he would give the note if he would embody in that note all the conditions that were in the contract, but it was never carried out. He never gave any note up to the time Stewart disappeared."

It is not denied but what Stewart drew the money direct from the bank and used it in this enterprise; it was a private affair, a private investment in which the bank was in no manner interested. It was a taking of the money from the bank by the cashier without any authority and in direct violation of law.

Counsel say the bank acquired an equitable lien in Fisk's share in the Shillapoo project and should have received Fisk's stock. Counsel know that that was not the agreement; the bank acquired no interest, received nothing, and will receive nothing on that account.

Counsel undertake to avoid the effect of this action of Stewart's by charging that the cashier and other officers had violated the law by taking money from the bank without authorization. There can be no justification or ratification of an illegal criminal act.

Counsel say that there is no evidence that the bank lost any money. The amount was credited to Stewart and it appears in the testimony that when Stewart disappeared and the bank failed that he was \$200,000.00 in debt with no assets of any consequence.

KELSO FARM COMPANY NOTES

It is admitted that the Kelso Farm Company was Stewart's farm and was merely a trade name. Counsel undertake to justify this abstraction of the bank's funds by Stewart of \$5950.00 by saying that a resolution was passed at a meeting of the directors on January 11, 1921, authorizing a loan of \$6000.00 to Stewart. There was no resolution passed in the manner required by law and no resolution passed referring to this loan or any loan involved in this litigation. The \$6000.00 referred to in the resolution of January 11th was in the claim presented to plaintiff in error, but was not pressed because of the resolution of the board of directors. The resolution made no reference to any of these loans, had nothing whatever to do with the loan to the Kelso Farm Company, but referred entirely to another matter.

Counsel again repeat that the bank lost nothing by this money which Stewart took from the bank and used for private purposes. The bank suffered a loss of the entire amount and it was embezzled from the bank by Stewart and clearly falls within the provisions of the bond.

THE RICHTER WARRANTS

Counsel urge that the Court was in error in allowing a recovery on the Richter estate warrants.

No claim was made on account of these warrants when the claim was presented to plaintiff in error. These warrants belonged to the Phillip Richter estate. Stewart was administrator of this estate; he took these warrants from the estate, discounted them to the bank, and took personal credit for \$2000.00 representing the face value of the warrants. (See transcript, pp. 177-182.) After the bank passed into the hands of the bank examiner he was compelled to surrender these warrants to the lawful owner and thereby lost the \$2000.00. This loss was not discovered until after the main claim had been presented to the bonding company.

Stewart's relations with the bank ended when the examiner took charge, he was not connected with it thereafter. A notice of defalcation could not affect the company's liability because he was no longer connected with the bank, all defalcations had occurred previously and the company could not have been injured in any manner whatsoever by the failure to give notice of this particular claim. The company did have notice of a large claim made by the liquidating officer against the company. The attorneys for the company made an extended investigation following the closing of the bank and examined in great detail all of the books of the bank and also discovered the true situation about these warrants, entered into a stipulation

with reference to the warrants. Under these circumstances the giving of a notice to them would have been wholly useless and of no value or importance to them; it could not have in any manner affected their legal rights.

In 19 Cyc., 522, the rule is given as follows:

“It is very usually stipulated in policies or bonds of the nature under discussion, as a condition precedent to a recovery thereon, that the insured shall, upon the discovery of any default or loss, immediately give the insurer notice, in writing. Such a stipulation has, however, been construed to require, not that notice should be given to the insurer instantly on the discovery of a default or loss, but merely that such notice should be given within a reasonable time thereafter, having in view all the circumstances of the case. Such notice may be waived by the insurer, or a waiver may result from the acts of the insurer’s authorized agent.”

There has been a denial of liability in this case from the beginning. The defendant company through its attorneys made an exhaustive examination of the records of the bank, the claim was presented for a very large amount and payment refused and this action was commenced. These items were discovered after notice of the main claim was given, so it is our contention that the company waived any objection to including this item in this action and that including it in the complaint was sufficient notice; in any event it would only affect the question of costs.

If the court should construe the bond to be a statutory one then it was not necessary to present any claim. It is only in the event that it should be construed as a contract bond that this question becomes important, and then we claim that under the facts as disclosed in this record that the plaintiff in error was not prejudiced in any manner by the failure to be formally notified of this claim. The attorneys for plaintiff in error knew of this claim long before this action was commenced.

COMMON LAW BONDS

It is our contention that after the passage of the banking act by the legislature of Washington in 1917 that the bond became an official statutory bond.

Section 32 of chapter 80 of the banking act of the State of Washington provides that the board of directors of each bank shall require its active officers and employees to give a surety company bond in such sum as the board shall specify, and the state bank examiner shall approve it, conditioned for the faithful and honest discharge of his duties and for the faithful application of all moneys, funds and valuables which shall come into his possession or under his control.

Section 7246 of Remington's Compiled Statutes of Washington for 1922, being Section 6059-193 of Remington's Code, authorizes bonding and casualty companies to furnish bonds of this character, and Section 777 of Remington's Compiled Statutes for 1922 provides that no bond required by law, and intended

as such bond, shall be void for want of form or substance, recital, or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the laws requiring the same, to the amount specified in such bond.

These statutes inevitably lead to the conclusion that it was the duty of the officers of the bank to take a bond from the cashier and that if a bond had been required from the cashier and it had been furnished in compliance with the requirements of the statute it would have become an official bond governed by the laws applicable to official bonds. The question arises here, does the fact that this bond had been previously given and was renewed after the passage of the law and continued in force by renewals until the bank became insolvent, and in the absence of a showing that it was furnished directly in response to the requirements, make it a contract bond and relieve it from the character of an official bond?

The law presumes that the officials performed their duty and in the absence of a showing to the contrary the court must conclude that the bond was furnished as required by law. The directors could very well have concluded that no action on their part was necessary as the bond was in force at the time of the passage of the law and was thereafter annually renewed. The fact that some officer or officers of the bank may not have performed their full duty in regard to this bond would not change its character or

relieve the defendant from liability. The fact, also, that the bond did not contain the statutory conditions would not release the liability fixed by statute, for the law is read into the bond and all parties must take notice of the conditions of the bond as required by law.

Counsel seem to place great reliance upon the case of *Puget Sound State Bank vs. Gallucci*, 82 Wash. 445.

We have read this case with care and we cannot see any possible application of the decision to the question now before the court. It in no manner discusses the question now before the court and it was in no way involved. The language quoted in counsel's brief clearly proves that the decision has no application. In that case a bond was furnished in pursuance of the statute requiring bonds to be taken for public work. The bond contained the statutory requirements and then as construed by the Supreme Court some additional language binding it to pay certain liabilities which were not required by the statute, and the court merely held that having gone further than the statute required and entered into what the court construed to be a contract with the bank, it became obligated to pay the bank according to the terms of its contract. The question of whether it was a statutory bond, or not, was not before the court. The only question that was involved so far as this matter was concerned was whether having gone beyond the requirements of the statute and obligated

itself to perform more than the statute required it could be held to the performance of the terms of its contract and the court held that having voluntarily assumed the obligation that it could not avoid payment. The question here is not whether this company has gone beyond the contract, but whether this should be construed to be a statutory bond or a common law bond. The law will presume that the bond was given in pursuance of the statute. It is not in the exact language of the statute, but it covers substantially the same matters.

The statute requires that the bonds shall be conditioned for the faithful and honest discharge of the duties of the officer and for the faithful application of all moneys, funds and valuables which shall come into his possession or under his control. The condition in the first bond was to cover losses sustained by any dishonest act or acts committed by the employee in the performance of the duties of his office, and in the second bond given the conditions were to cover losses sustained through the fraud, dishonesty, forgery, theft, embezzlement or wrongful abstraction, directly or in connivance with others, of the employee, etc.

The court will notice that the statute requires a bond conditioned for the faithful and honest discharge of his duties and for the faithful application of all funds, while the latter bond covers fraud, dishonesty, forgery, theft, embezzlement or wrongful abstraction,

and the first bond is for dishonest act or acts committed by the employee.

There is substantially no difference in the requirements of the statute and the bond. They cover the same losses, the same dishonesty, and are intended to reach the same liabilities and to protect the bank against the same losses. There is a very wide distinction between those cases where it is the mere use of words meaning substantially the same thing and the Gallucci case where the company had gone beyond the statute and entered into a contract of additional liability.

Counsel cite *Western C. & G. Ins. Co. vs. Muskogee County*, L. R. A. 1917-B, page 977. If the court will read this case it will discover that the language used by the court was a mere statement of the court not in issue in that case and was contrary to the doctrine of the decision and to the authorities cited by the court.

The court in that case held that one who guarantees by bond the payment of public funds deposited in a county depository under the statute could not defeat liability on the bond by saying that the designation of such bank was irregular or illegal, and further, that where a bond was executed pursuant to the statute containing the conditions required and in addition other conditions not required by statute tending to limit or evade liability, the bond would be upheld as to the conditions imposed by the statute and the other provisions would be treated as surplusage.

So that decision is an authority in our favor for it holds that where in a statutory bond conditions are inserted which tend to limit or evade liability that the courts would construe it as a statutory bond and uphold it as to the conditions required by statute. And in that decision there is cited and quoted from the Supreme Court of New York this language:

“Where the form of an official bond differs from that prescribed in the statute, if founded upon a good consideration, the liability of the surety is measured by the provisions of the statute rather than the language of the obligation itself.”

In *Southwest Surety Insurance Co. vs. Davis*, 156 Pac. 213, the court held that until the contrary is made to appear the law presumes that officers have discharged the duties which the law imposes upon them.

In this case the court held that to give the language of the bond a literal interpretation would render it ambiguous and nugatory and relieve the surety from all liability * * * the bond sued on, being a statutory one, and given in an attempt to comply with the statute, in order to avoid such a result, the court will read into the bond the statutory conditions and consider the same to guarantee the fulfillment of contracts entered into within the year.

In *Board of County Commissioners vs. Security Bank*, 77 N. W. 815, the Supreme Court of Minne-

sota in passing on a bond furnished by a bank designated as a depository county bond used this language:

“It is familiar law that in taking a bond from a public officer to secure the performance of his official duties the state or any municipal sub-division of it, does not contract with the sureties against the negligence or misfeasance of other public officials in the performance of their duties designed for the benefit and protection of the public, and hence that such negligence or misfeasance will not release the sureties, although the due performance of such duties might have prevented loss to the public caused by misfeasance of the principal on the bond, and thereby also prevented loss to the sureties. One of the most common examples of the application of this rule is where some public officer or board, having a supervisory power over another officer, has failed to perform his or its duty by examining the books and vouchers of the principal obligor on the bond, or by requiring him to make reports or settlements at stated periods as required by law.
* * * And it is the general rule as to suretyship on official bonds, given to secure the public, that the negligence or misfeasance of other public officials is not chargeable to the public.”

So in the matter now before the court, if the bond is to be held to be an official bond then the negligence or misfeasance of the board of directors would not affect the bond or release it from liability.

We desire to call the court's special attention in this connection to the case of *U. S. Fid. & Guaranty*

Co. vs. Fred H. Poetker, reported in L. R. A. 1917-B, p. 984.

Counsel undertake to avoid the force and effect of this decision by the statement that the bond contained all of the conditions of the statute and some additional provisions, but the real question before the court in that case was the same question now before the court in this case. To bring the question involved in that case before the court we quote:

“In the main the questions raised by appellant surety company are based upon the assumption that the bond which was executed for Behrens to secure to the bank the faithful discharge of his duties as its cashier is a common law undertaking and that a recovery on it can be sustained only according to the numerous and intricate provisions and conditions contained in it and the written application for it. In behalf of appellee it is claimed that the bond must be held to be a statutory official bond legally of a character and with such conditions only as the statute provides.”

The court will see from this that the surety company was attempting to avoid liability because the bond which it furnished to the cashier contained numerous conditions not required by the statute. That is what the company is seeking to do here. It is true that it does not appear that the bond in this case was furnished directly in pursuance of the statute, but it is our position that it was the only bond given and

that it took the place and should be given the force and effect of a statutory bond.

Quoting further from that decision:

“It will be noted that while this statute leaves the amount of the bond to be fixed at the discretion of the board of directors, it is mandatory upon them to exact a bond from each of the officers named and by its terms states the simple condition upon which it must be given in clear and unmistakable words; namely, that the officer will honestly and faithfully discharge his duties as such officer during his continuance in office. Such a plain and simple obligation with the broad and comprehensive condition the statute requires and one less direct and less burdensome for the surety does not satisfy it.

“A bond such as the one given in this instance which is manifestly prepared with studied care to avoid all liability on the part of the surety except such as might grow out of a loss that might occur to the one to whom the bond was given, even after he had exercised that close and relentless vigilance which makes stealing well nigh impossible, certainly does not fulfill the requirements of the statute.”

Again quoting from this decision:

“It has been frequently decided in this state that bonds taken pursuant to a requirement of a public statute are official bonds within the meaning of this section of the statute. * * * It has also been held that the provisions of the statute requiring the bond to enter into and become a

part of the bond, whether written in it or not, and constitute the contract upon which both the rights and the liabilities of the surety are to be determined. * * * And quoting from Childs on Suretyship and Guaranty, Sec. 91, p. 22:

“The general rule is, that where a contract of suretyship is entered into pursuant to a statute or to a by-law, the statute or by-law forms a part of the contract of the surety. If the law has made the instrument necessary the parties are deemed to have had the law in contemplation when the contract was executed. Citing authorities.’ ”

Again quoting from the Poetker decision:

“It would be immaterial whether such bond is in terms payable to the state. The law makes it so payable. It would be immaterial to the surety’s liability whether Parks executed it. The surety is liable whether he did or not. And it is immaterial that the instrument, though signed by Parks, yet on its face imports no obligation on his part to the state. The law imports that obligation into the bond. On the other hand, no account is to be taken of, and no operation is to be given to the several stipulations and conditions set down in this paper which tend to eliminate the liability which the official bond imports, or to clog or impeach the remedy for the enforcement of such liability. The right of recovery is the same in the abstract and as to the amount as if the bond had expressed the statutory conditions, and those only; an action upon it is maintainable under the same condition.”

We think that this case is controlling of this question and that the court must conclude that the bond in this case should be treated as an official bond and the liability of the plaintiff in error determined upon that basis.

BREACH OF WARRANTIES

It is contended by counsel that plaintiff cannot now recover because at the time when each renewal was given the president of the bank signed a certificate certifying that Stewart had faithfully, honestly and punctually accounted to him for all money and property in his control or custody as an employee of the bank, and had always had proper securities and funds on hand to balance his accounts and is not now in default.

The court will discover from a reading of the record that Carothers, the president, had no knowledge of any misdeeds by Stewart. Stewart had not taken money directly from the bank except in the loans to himself.

The acts of Stewart for which we are seeking to hold the plaintiff in error responsible are the negotiating his own notes to the bank and loaning money to himself. Carothers may not have known it was illegal and so far as he knew Stewart was honest and acting in good faith. There was no question but what the funds on hand were correct, his accounts always balanced. From Carothers' standpoint and knowledge he was telling the entire truth; there was no inten-

tional misstatement of any fact, no fraud practiced by Carothers, he told the truth as he understood it.

We contend, however, that Carothers had no right or authority to make any such certificate and it is immaterial what he stated so far as this case is concerned.

On this point we would call the court's attention to the case of *American Surety Company vs. Pauly*, where the Supreme Court of the United States held that the president of a national bank had no power in the ordinary course of business to certify to the fidelity or integrity of the cashier for the purpose of enabling him to procure a bond insuring his fidelity; and hence, the bank cannot be deemed, merely by virtue of the president's relation to it, to have any knowledge of the giving by him of such certificate. In passing on this question the court said:

"But that the making of a statement as to the honesty and fidelity of an employee for the benefit of the employee and to enable the latter to obtain a bond insuring his fidelity, was no part of the ordinary routine business of the bank president and there was nothing to show that by any usage of this particular bank, such function was committed to its president. It must therefore be taken, as between the bank and the company, that the former cannot be deemed, merely by reason of Collins' relation to it, to have had constructive notice that he, as president, gave the certificate in question."

So, in the case at bar, there is nothing in this

record that the directors or other officers of the bank ever had any notice or took any part in the giving of the certificate that Carothers gave. There is nothing to show that they knew anything about it or that anyone knew anything about it except Stewart, who was giving the bond, and Carothers. Stewart's knowledge could not be construed against the bank for he was the party giving the bond, and Carothers' knowledge under the decisions cited was not the knowledge or act of the bank.

In *Fidelity & Deposit Company vs. Courtney*, 22 Sup. Ct. Rep. 833, the Supreme Court of the United States held that in a suit against a surety on the cashier's bond a plea that the cashier's defalcation was known to and connived at by the officers of the bank was held to be no defense and that the knowledge of the vice-president and one or more of the directors but less than a majority of the board of a default by the president was not rendered imputable to the bank so as to relieve the surety on the bond from liability.

We contend further in this connection that even though Carothers had authority to give the certificate that the matters contained in the certificate were not warranties but mere statements of fact.

In *Lieberman vs. First National Bank*, 48 L. R. A. 514, the Supreme Court of Delaware held that statements made by the cashier of a bank without authority for the purpose of inducing a person to become the surety on the bond of a teller would not bind the bank

so as to relieve the sureties if the statements were not true.

In *Title Guaranty & Surety Co. vs. Nichols*, 32 Sup. Ct. Rep. 475, the Supreme Court of the United States in passing upon this question used this language:

“It is said that this statement was untrue, in as much as, at the date of such renewals, the books and accounts were not correct and the cashier was short in his cash. But the certificate is not to be taken as a warranty of the correctness of the accounts. The mere fact that the examination, if made by a reasonably competent person, failed to discover discrepancies covered up by false entries or other bookkeeping devices would not defeat the renewal. The case at this point went to the jury upon the fact of reasonable examinations and the good faith of the bank in making the representation.”

In *Remington vs. Fidelity & Deposit Co.*, 27 Wash. 429, the Supreme Court of Washington in passing upon this question held that

“In the absence of a showing of fraud in obtaining an extension the certificate was merely a representation of a fact and not a warranty of its truth.”

Applying this rule to the facts before the court it is clear that the certificate given by Mr. Carothers was furnished in the utmost good faith. There was no fraud practiced by him and no intentional wrong on

his part. That being true, it would not become a bar to a recovery but would be left as a question of fact for the court.

We would also call the court's attention to the clear distinction between what occurred before the original bond was given and at the time it was given and the conditions contained in the original bond and the certificates of Mr. Carothers for renewals.

No question is urged that the statements made in the application for the bond were untrue or false, or that the Surety Company should be released because of anything occurring at the time the bond was given. There is no claim of fraud on the part of Mr. Carothers when he signed the renewal certificates. There is no showing in the record of fraud on his part. While Mr. Carothers was nominally president of the bank he exercised no management or control over the affairs of the bank; he was operating a store, gave little or no attention to the affairs of the bank, trusted to Stewart entirely, and signed the certificates for renewal each year without any sort of showing of actual knowledge or intentional fraud. This would leave the renewal certificates as merely representations of fact and not warranties.

RATIFICATION

Counsel contend that the officers of the bank by their conduct have ratified the illegal loans and unlawful abstractions of Stewart.

It is our contention that under the act of 1917 there can be no ratification of an illegal act; but whether that is so, or not, there is no evidence at all in this case of any ratification, directly or indirectly, by the board of directors of any of these loans in question in this case.

The very most that can be said about it is that some of the directors had borrowed money from the bank illegally; some of them might have known of Stewart's illegal borrowing and illegal transactions, but knowledge on their part of illegal and unlawful conduct on Stewart's part in using the money in the bank for private purposes connected with his private undertakings could not possibly amount to a ratification.

There is an early decision by the Supreme Court of the United States which we think has a very important bearing upon this case. We refer to the case of *Minor vs. Mechanics' Bank of Alexandria*. In the edition we have it is Volume 7, 12th Wheaton, 1 Peters, page 445. Quoting from that decision:

“The question then comes to this, whether any act or vote of the board of directors, in violation of their own duties and in fraud of the rights and interest of the stockholders of the bank, could amount to a justification of the cashier, who was a *particeps criminis*. We are of opinion that it could not. However broad and general the powers of the direction may be for the government and management of the concerns of the bank, by the general language of the charter and by-laws,

those powers are not unlimited, but must receive a rational exposition. It cannot be pretended that the board could, by a vote, authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud, every known departure from duty, by the board, in connivance with the cashier, for the plain purpose of sacrificing the interest of the stockholders, though less reprehensible in morals or less pernicious in its effects than the cases supposed, would still be an excess of power, from its illegality, and, as such, void as an authority to protect the cashier in his wrongful compliance. Now, the very form of these pleas sets up the wrong and connivance cannot for a moment be admitted as an excuse for the misapplication of the funds of the bank by the cashier."

This decision was written by Judge Storey. It was upon a cashier's bond given to the bank and contained the condition that the officer would well and truly execute the duties of cashier. It is true that this bond did not contain, so far as the case discloses, the numerous conditions found in the bonds in the case now on trial, but it is our contention that the same principle would apply to the conduct and actions of the directors as in the case just cited. And in this connection we desire to call the court's attention to

this thought, that if the bank was insolvent to the extent shown by the testimony of Mr. Adams then neither the cashier nor the directors would be justified or authorized in making a loan to one of its own officers, either directly or indirectly, and any attempt to do so would have been in violation of the law and would fall within the doctrine announced in the decision just cited. This decision has been cited, approved and followed in a number of recent decisions of the same court.

It would be illegal and dishonest to permit a board of directors to authorize a loan to one of its own officers at a time when the bank was clearly insolvent and in need of finances to carry on its business and meet its obligations and an attempt to do so would be dishonest and in violation of law.

In *Enc. of U. S. Supreme Court Decisions*, Vol. 3, p. 99, the following rule is given:

“The official bond of a cashier must be construed to cover all defaults in duty which are annexed to the office from time to time by those who are authorized to control the affairs of the bank, and the sureties in the bond are presumed to enter into a contract with reference to the rights and authorities of the president and directors under the charter and by-laws. It obligates not only to honesty, but to reasonable skill and diligence, covers wilful or permissive misapplication of the bank’s funds and default cannot be excused by any act or vote of the directors in violation of their duties; such as an attempted

sanction of an usage to allow overdrafts, or in the absence of express agreements, by the laches or negligence of the directors, not amounting to fraud or bad faith, or by the connivance of ordinary agents or employees.”

The above is taken from the work mentioned and is supported by citations from decisions of the Supreme Court of the United States.

Clearly, the discounting of notes in which Stewart was personally interested would be in violation of his duties as cashier of the bank and would amount to a wilful misapplication of the bank's funds.

In *McShane vs. Howard Bank*, 10 L. R. A. 552, quoting:

“The directors are not the creditors; the body corporate is. If the directors were derelict in not giving notice to the sureties or if the directors ever connived at the fraud of Sidgaway the sureties of the latter cannot claim exemption because of the neglect or misconduct of other officers. It is a sound principle that the failure of one officer of a corporation to discharge his duty does not release the sureties of another from responsibility for the defaults of the latter.”

In *Am. Surety Co. vs. Pauly*, 18 Supt. Ct. Rep., 552, the court held that if the bond of a fidelity insurance is fairly and reasonably susceptible of two constructions that most favorable to the insured must be adopted; because the instrument was drawn by the attorneys, officers or agent of the surety company.

In *German Savings Bank of Des Moines vs. Des Moines National Bank*, 98 N. W. 606, the court used this language:

“It is elementary that an agent cannot bind his principal, even in matters touching his agency, where he is known to be acting for himself or to have an adverse interest.”

From 9 L. R. A. (N. S.), page 471, we take this from the note:

“The decision in *First National Bank vs. Gunhus*, is based upon the well established principles that a bank cashier, although possessing broad powers pertaining to the management of the affairs of the bank, cannot deal with the assets thereof for his individual benefit, as his fiduciary relations therein cast upon him the duty of exercising the utmost good faith and fairness in all his personal transactions with the bank, and that a debtor cannot, without the express agreement and consent of his creditor, cancel his debt by the substitution of a note or obligation of a third person therefor; nothing but money, in the absence of express agreement, being sufficient cancellation of the debt. Neither can the cashier represent both himself and the bank in a transaction wherein he is personally interested.”

In *Mendel vs. Byrd*, 99 N. W. 493, it is held that the general authority of a cashier does not authorize him to issue drafts of the bank for himself or for his private use. See also: *Kochler vs. Dodge*, 47 N. W. 913; *Buffalo Co. Bank vs. Sharpe*, 58 N. W. 734.

“An officer cannot act in a transaction in which he is personally interested for both parties, and should he do so his acts would not bind the bank and would become valid only through implied or express ratification. The sale of a note by the president or cashier of a bank of which he is manager can never be valid without some act of the directorate.” 5 Cyc. 466.

See also *Adolph Kempner vs. Citizens Bank*, 116 N. E. 441. We would call the court's attention to this language:

“The law will not permit a conflict in this way between his interest and his duty and removes the temptation to wrong by absolutely disabling him in such a case from acting for himself and at the same time for his principal.”

Also, in *West St. Louis Savings Bank vs. Shawnee County Bank*, 95 U. S. 557, it is held:

“The cashier of a bank is not presumed to have power by reason of his official position to bind his bank as an accommodation endorser of his own promissory note.”

In *Fidelity & Deposit Co. vs. Courtner*, reported in 22 Sup. Ct. Rep. 833, the Supreme Court of the United States in passing upon the bond of an officer of a bank in an action by the receiver used this language:

“It is well settled that, in the absence of express agreement, the surety on a bond given to a corporation, conditioned for the faithful perform-

ance of an employee of his duties is not relieved from liability for a loss within the condition of the bond by reason of the laches or neglect of the board of directors, not amounting to fraud or bad faith, and that the acts of ordinary agents or employees of the indemnified corporation conniving at or co-operating with the wrongful act of the bonded employee, will not be imputed to the corporation."

The facts in the case now before the court disclose that Stewart had general management and conduct of the affairs of the bank; the directors met occasionally and Stewart made reports from time to time of what purported to be the condition of the bank. These reports were accepted by the directors, apparently, as being correct and truthful and as showing the real condition of the affairs of the bank. And it now appears that during this time that the bank was actually insolvent and known to be insolvent by Stewart but not by the directors or president of the bank.

The testimony also shows that other officers had from time to time borrowed money from the bank and that Stewart had been borrowing from the bank. The most that can be charged against the conduct and action of the directors was that of laches and neglect. There was no proof, and indeed, counsel did not contend during the trial of the case, that the directors had been guilty of fraud or bad faith. They may have been misled by Stewart, they may have been guilty of laches and they may have been guilty of neglect, but no other inference can be drawn from the the entire

case; no one can contend that the directors were guilty of actual fraud or intentional bad faith. What they did was in good faith, trusted to Stewart, accepted his reports at full face value, and continued to permit him to conduct the business of the bank. They may be responsible to the depositors for their negligence and inattention, but that does not release the surety upon the cashier's bond; before that can be done it is necessary for it to clearly appear that they were guilty of fraud or misconduct amounting to bad faith.

American Surety Company vs. Pauly, 18 Sup. Ct. Rep. 522, was an action upon a surety bond given to a bank by the cashier. On the question of the duty of the bank to notify the surety of the dishonest acts of the cashier the court held that the bank was not required to give notice based upon suspicion of irregularities or suspicion of fraud, but that it was not bound to act until it had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for the misconduct. On this point see also

Fidelity & Casualty Co. vs. Bank of Timmons-ville, 71 C. C. A., 229; 139 Fed. 101.

In *Lieberman vs. First National Bank*, 48 L. R. A., reading from page 519, the court held that there was no positive duty resting on the officers of the bank to investigate with a view to inform the surety in the absence of any inquiry or request to do so, and that negligence of directors and their agents was no excuse.

In the cases referred to by counsel the officer of a bank was giving information in response to questions submitted to him and the statements made were a part of the duties which he was performing and within the scope of his powers and duties. The cases holding to the contrary are cases like our case where a general certificate was given by some officer not connected with any duties which he was performing for the bank, not within the scope of any of his powers or authority. This distinction is pointed out in the Willoghby case and is particularly noted in *Fidelity & Deposit Co. vs. Courtney*, 22 Sup. Ct. Rep. 833.

We wish to call the court's attention particularly to this latter decision as there are several points which bear upon the argument which we are now presenting. Quoting:

"Instruction No. 7 dealt with the \$2000.00 note transaction. In effect the jury were instructed that the knowledge of the cashier acquired in the performance of his duties might be imputed to the bank, but that the vice-president or an individual director did not hold such an official relation to the bank as that his knowledge of wrong doing by McKnight, if not communicated to the bank, could be treated as the knowledge of the bank. We do not deem it necessary to analyze the instructions given by the court for the purpose of determining whether they were in all respect accurate, because we are of the opinion that if the court in anywise erred it was in giving instructions which were more favorable to the defendant sureties than was justified by the prin-

ciples of law applicable to the case. It is well settled that in the absence express agreement the surety on the bond given to a corporation conditioned for the faithful performance of an employee of his duties is not relieved from liability for a loss within the condition of the bond by reason of the laches or neglect of the board of directors, not amounting to fraud or bad faith, and that the acts of ordinary agents or employees of the indemnified corporation conniving at or co-operating with the wrongful act of the bonded employee will not be imputed to the corporation."

And quoting further from this decision:

"Manifestly this stipulation is not fairly subject to the construction that it was the intention that the neglect or omission of a minority in number of the board of directors or the neglect or omission of subordinate officers or agents of the banks should be treated as the neglect or omission of the bank. The provision is not that a minority in number of the board of directors or that subordinate officers or agents would exercise due and customary supervision, and would not condone a default of the bonded employee or retain him in his employment after the commission of a default, but the agreement is that the bank would do or not do these things. This in reason imports that the things forbidden to be done or agreed to be done were better either done or left undone by the bank in its corporate capacity, speaking and acting through the representative agents and empowered by the charter to do or not to do the things pointed out. To hold to the contrary would imply that the bond forbade the doing of

an act by a person who had not power to perform or command a performance by one who could not perform. Assuredly, therefore, the conditions imputed in the stipulation to which we have referred, both as to doing and non-doing, contemplated in the reason of things the execution of the duties which the contract imposed on the bank, either by the governing body of the bank, its board of directors, or by a superior officee, such as the president of the bank, having general powers of supervision over business of the corporation, and vested authority to condone the wrong doing or to discharge a faithless employee. That is to say, the stipulation in all its aspects undoubtedly related to the bank acting through its board of directors, or through an official who from the nature of his duties, was in effect the vice-principal of the bank."

There was no evidence offered that the president had any of the powers mentioned in this decision. The evidence that was given upon the subject was to the contrary. Everything indicates that he was in no manner a vice-principal of the bank; he had no authority to condone the wrong or to discharge the faithless employee. He exercised no general power of supervision over the business of the bank. He was merely a nominal head possessing none of the powers necessary to bind the bank in the particulars set forth in this decision.

This decision further distinguishes this case from the case of *Guarantee Company of N. A. vs. Mechanics' Savings B. & T. Co.*, 183 U. S. 402; 22 Sup. Ct.

Rep. 124, for in that case the information was held imputable to the bank, for it had been communicated to the president of the bank and was required to be made by him.

We would call the court's attention to the case of *U. S. Fidelity & Guaranty Co. vs. Muir*, 115 Fed. 264; 53 C. C. A. 56 (Certiorari denied in 187 U. S. 648). This case quotes from the Pauly case and notes the distinction between the Pauly case and the case of Mechanics' Savings Bank, cited by counsel.

The court will notice in the Pauly case this thought, that the bond furnished in these cases was furnished by the cashier; the bank was not procuring the bond; it was a contract entered into originally between Stewart and the bonding company. It is true it was for the benefit of the bank and later it became a statutory bond required by the statute. Assuming for the purpose of this argument, however, that it was a contract bond, the contract was made between Stewart and the company and not between the company and the bank, as was said in the Pauly case:

"In the first place the procuring of a bond for O'Brien, in order that he might become qualified to act as cashier, was no part of the business of the bank, nor within the scope of any duty imposed upon Collins as president of the bank. It was the business of O'Brien to obtain and present an acceptable bond."

It is our contention that provisions contained in the bond imposing certain conditions upon the bank

and making the representations of one officer of the bank binding upon the bank would be without authority, for the company could not say who should represent the bank; the law directs where authority shall be vested in the management of the affairs of a bank, with the additional right to impose authority upon other officers and employees.

Counsel in their brief under this head have cited a great many decisions and a number from the Supreme Court of Washington. We confidently believe that when the court comes to examine these authorities it will readily be seen that they have no application to this question.

All of this argument under this branch of the case is pertinent only upon the theory that the bond sued upon in this case was not a statutory bond but a common law bond. If it is a statutory bond, as we contend it is, then this argument becomes irrelevant and immaterial.

NO DISHONESTY

Under this title counsel argue that there was no dishonesty shown. The bond in force until April 30, 1920, was conditioned to reimburse the bank for all loss which the bank sustained "by any dishonest act or acts" of the said Stewart in the performance of the duties of his office or employment. The bond given and in force from April 30, 1920, until the bank failed was conditioned to cover loss through fraud, dishon-

esty, forgery, theft, embezzlement or wrongful abstraction.

We have already called the court's attention to the fact that the loan to Stewart under the trade name of the Kelso Farm Company for \$5950.00, the Fritz Kruse accommodation note for \$5000.00, and the Fisk dummy note for \$5000.00 were all under the bond given on April 30, 1920, but aside from that question, if Stewart took the bank's money illegally or unlawfully or with a fraudulent or dishonest purpose, it would render the company liable under the conditions of the first bond, for if he was guilty of a crime under the law and took the money in violation of law, it would be a dishonest act.

The evident purpose of the bond was to cover the unlawful appropriation of the funds of the bank, what other purpose could the bond serve? If it was only intended to cover immoral acts where the bank suffered no loss what was the reason for giving it? It was clearly intended to cover just such losses as the bank suffered here, losses occurring through the fraudulent, unlawful and criminal acts of the officers of the bank.

It has been our understanding that when an act is made a felony, a serious crime, that to violate the law is both immoral and illegal, and dishonest in the meaning of dishonesty as used in this policy; but counsel say that it was merely an exercise of poor judgment and urge that Stewart did no intentional wrong; that

is far from the facts, there is no question of judgment. Stewart took the money illegally and used it. Under counsels' contention if an employee of a bank takes the money of the bank with the sincere intention of repaying it, it is not dishonest, but it is, nevertheless, a crime, and it would be dishonest regardless of his good intentions. If Stewart had taken this money from the bank without any semblance of a loan, with the intention of paying it back, and had used it in his private enterprises, would counsel contend that the act was not dishonest and within the purview of the policy? What is the difference here? The only difference is that he gives his note, or the note of some friend who was interested with him in some private deal, and takes the money. He does not take it clandestinely, there is a record of it, but he takes it just the same, and the bank loses it. The legal liability is the same, the moral and criminal responsibility are the same. In both cases it is illegal and dishonest and made a crime.

We would call the court's attention to *State vs. Lindberg*, reported in Vol. 25, Washington Decisions, No. 1, p. 128.

In this case the defendant was prosecuted under the banking laws of the State of Washington. The defendant was a stockholder and a director in the bank and while such director borrowed from the bank on his unsecured note the sum of \$13,000.00. The bank subsequently became insolvent and was taken in charge by the state banking officers for liquidation.

The information charged that the defendant while a director of the bank named borrowed the money therefrom without a resolution authorizing the same and approved by a majority of the directors of the bank at a meeting at which he was not present, and entered in the corporate minutes of the bank. The defendant was found guilty and the conviction was sustained by the Supreme Court. Referring to the contentions of counsel and to the statute the court said:

“Clearly, to our minds, this is a provision directed against the borrowing officer, and makes him guilty of a felony if the borrowing is in violation of the provisions of the act.”

Again:

“Nor was it necessary that the state allege and prove a financial loss as a result of the borrowing. By the terms of the statute, the crime is complete when the borrowing is consummated without a compliance with the statutory requirements; loss of the money borrowed is not an element of the offense.”

The charge against the defendant in this case was the borrowing of money from the bank while an officer of the bank and the court sustained a conviction without other showing of wrongful intention or a criminal intent. So if the defendant in that case was guilty of a crime, Stewart was guilty of a crime when he took the money belonging to the Kelso State Bank whether he took it directly or indirectly through the discount of his own worthless notes to the bank.

In *State vs. Larson*, reported in Vol. 22, Washington Decisions, No. 10, p. 471, the Supreme Court of Washington had occasion to pass upon the withdrawal of money from a bank by the vice-president and manager. In that case the vice-president was also interested in another bank which was in financial distress. It was a member of the Federeal Reserve Bank and the Federal Reserve officers were threatening to cancel the membership. In order to avoid that an agreement was made to raise a certain amount of money; to do that the defendant drew from the bank of which he was vice-president a sum of money and deposited it to the credit of the other bank; the defendant was charged with embezzlement and the Supreme Court sustained a verdict of guilty. In passing upon the matter the court said:

“The mere fact that an officer of the bank makes a loan from that institution, however regular and usual it may, on its face, appear to be, does not necessarily deny intent upon his part to defraud the bank by converting the money to his own use. * * * Being in a position of trust and thus having possession of the bank’s money he may be guilty of larceny provided he takes the money feloniously and with the purpose and intent to defraud the bank and for his own use. The mere fact that the transaction may take the form of a loan would not necessarily deprive it of its criminality.”

The Supreme Court of Washington quotes from *Reeves vs. State*, 95 Ala. 31; 11 South. 158. It was held in that case that,

"Such an officer may be convicted of embezzlement or fraud in converting to his own use money belonging to the bank, although he possesses control thereof, and that it was immaterial whether his acts were perpetrated secretly or openly; and that, if such acts were consummated under the guise of a bona fide loan made with the assent of the other officers of the bank, such would not eliminate the criminality of the act, and that the fraud itself might be inferred from the misappropriation of the funds."

Quoting further from the Wash. decision:

"The distinction is between the making of mere irregular, unsafe or reckless loans of the bank's money, which would amount to maladministration only, and pretended loans, made in bad faith for personal advantage and with fraudulent intent, the pretended borrower being an officer, agent, clerk or servant having control and custody of money of the bank by virtue of his office or employment, which control and custody is shared by those making the pretended fraudulent loan, and who participate in the fraudulent purpose of the pretended borrower."

The case of *State vs. Kortgaard*, 62 Minn. 7; 64 N. W. 51, is very much in point on this question. It was held in that case that if a bank officer appropriated to his own use the funds of the bank entrusted to his custody with intent to deprive the bank of its property it is none the less embezzlement because done under the guise or form of a loan to himself, or an overdraft of his account.

Quoting further from the *Larson* case:

“Under our statute the offense is committed when the taking is felonious, and it is immaterial whether the taker has in mind that he will return the property taken or that he is taking it only for his own use temporarily.”

In this case Stewart discounted the Phillips, Shepard and Northwest Transportation Company notes to the bank and took credit for the sums represented by the notes. He had procured these notes through private deals and private transactions in which he was directly interested. He received the bank's money by the manipulation of these notes. Under the *Larson* case, *supra*, he was guilty of embezzling the funds of the bank. It was immoral, dishonest and criminal. The Kruse accommodation note, the Fisk dummy note, the Kelso Farm loans, was money taken directly by Stewart from the bank and he was guilty of violating the provisions of the banking act and also of embezzlement under the holding of the court in the *Larson* case. The same may be said of the Richter warrants. These warrants belonged to an estate, he put them in the bank and drew the money and used it for his private purposes. He was guilty of a double crime here, he was attempting to defraud the guardianship estate and violating the banking laws and the embezzlement statute of the state.

NO LOSS

It is contended by counsel that the record does not disclose that the bank sustained any loss.

The evidence establishes beyond any question that in the matters and items discussed and upon which the court based its findings that Stewart took credit in his own personal account for the sums of money represented by the various notes and other transactions mentioned. That, of itself, constituted a crime and was an appropriation of the bank's funds. It is not material, as far as the bank is concerned, what Stewart did with the money. When he took credit, drew the money from the bank and placed it in his personal private account, the bank lost the money; it was taken from the bank's assets and became subject to the control and disposition of Stewart. He could have been prosecuted under the laws of Washington, even though he did not make further disposition of the funds. When he drew the money on the Phillips notes, and the Shepard notes and the Northwest Transportation Company notes, and took credit for them on his own account the funds of the bank to that amount were transferred to his account and became subject to his control and disposition. When he drew from the bank the \$5000.00 represented by the Fisk dummy note he took from the funds of the bank that amount of money, and the same was true when he drew from the bank the \$5000.00 represented by the Fritz Kruse note and the Kelso Farm Loan notes and the Richter warrants. Furthermore, if it was necessary to establish that Stewart had disbursed those funds, which we do not concede, the evidence of Judge McKenney (pp. 346-347 of the transcript), shows that at the time

the bank failed and Stewart disappeared that his indebtedness amounted to about \$200,000.00, and outside of some property covered by mortgages his estate did not exceed \$1500.00, so that he was substantially \$200,000.00 worse off than nothing, and how can it be argued by counsel that the bank lost nothing when the money was taken by Stewart, used by him, and was taken from the bank and never returned?

VARIANCE

Counsel complain of a variance between the pleadings and the proof. There is no showing that counsel was surprised or in any manner prejudiced by any possible variance between the pleadings and the proof. Under the bonds furnished by the plaintiff in error counsel was given full opportunity to make investigation of the affairs of the bank before any action was commenced. Counsel embraced that opportunity, made an exhaustive examination in great detail, of the affairs of the bank, and were thoroughly familiar with every item of loss claimed by the liquidating officer. They entered into a stipulation with reference to the Richter warrants; they were thoroughly familiar with the Phillips, Shepard and Northwest Transportation Company notes from the time they came into the bank and with all of the matters with which the notes were in any manner connected. They had all of this information before the action was commenced and the record will disclose that from time to time during the trial they made suggestions and

gave information about the notes showing their thorough and entire familiarity with all matters connected with the notes.

In view of these facts and the further fact that no prejudice or injury has been shown, or even claimed during the trial, the plaintiff in error is not now in a position to urge any error because of any possible variance.

We therefore submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

MILLER, WILKINSON & MILLER,
A. L. MILLER, of *Counsel*

Attorneys for Defendant in Error.

In The United States
Circuit Court of Appeals
For The Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
a corporation,
Plaintiff in Error,

vs.

JOHN P. DUKE, Supervisor of Banking of the State
of Washington, liquidating the KELSO STATE
BANK,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION
HON. EDWARD E. CUSHMAN, *District Judge.*

REPLY BRIEF OF PLAINTIFF IN ERROR

GRINSTEAD, LAUBE & LAUGHLIN, and
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314 Colman Building, Seattle, Washington.

In The United States
Circuit Court of Appeals
For The Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
a corporation,

Plaintiff in Error,

vs.

JOHN P. DUKE, Supervisor of Banking of the State
of Washington, liquidating the KELSO STATE
BANK,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION
HON. EDWARD E. CUSHMAN, *District Judge.*

REPLY BRIEF OF PLAINTIFF IN ERROR

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**In The United States
Circuit Court of Appeals
For The Ninth Circuit**

FIDELITY & DEPOSIT COMPANY OF
MARYLAND, a corporation,
Plaintiff in Error,

vs.

JOHN P. DUKE, Supervisor of Banking
of the State of Washington, liquid-
ating the KELSO STATE BANK,
Defendant in Error.

No. 4048

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION
HON. EDWARD E. CUSHMAN, *District Judge.*

REPLY BRIEF OF PLAINTIFF IN ERROR

SET OFF

Defendant in error has cited many authorities on this question which are not in point. The case of *Yardley v. Philler*, 17 Sup. Ct. Rep. 835, cited on Page 8 of the brief, is based upon the rule that the debtor of an insolvent bank cannot set off against his debt a claim assigned to him after its

insolvency. As pointed out at Pages 18 and 19 of the brief of plaintiff in error, the set off is not based upon any claim assigned to plaintiff in error after insolvency, but is based upon the right of a surety which has paid an obligation for its principal on account of a bond executed prior to insolvency. The quotation from 34 Cyc. 678 on Page 9 of said brief refers to recoupment and not to set off. The definition of recoupment and set off, as given in 34 Cyc. on Pages 623 and 625, clearly distinguishes the rule cited from the case at bar.

Following the quotation given in said brief the rule relating to a set-off is stated in 34 Cyc. 680, as follows:

“Although it has been held under some statutes, particularly the earlier ones, that the right of set-off is limited to debts or demands growing out of a transaction independent of the contract sued on, the very general construction of statutes of set-off now is that the right of set-off extends to all mutual debts and demands between the parties, whether independent or unconnected with plaintiff’s cause of action, or springing from and connected with the contractual transaction upon which plaintiff’s claim is based.”

The statutes of the state of Washington, cited in the brief of plaintiff in error on Pages 16 to 18, expressly permit a defendant to set off, in an action arising on contract, any other action arising on contract and existing at the commencement of the

action. Relative to the quotation from 34 Cyc. 690, on Page 10 of said brief, the author is referring to reconvention and not to set-off.

With reference to the quotation from 34 Cyc. 696 relative to unliquidated damages, the plaintiff in error is not attempting to set off any unliquidated damages in the instant case. Its damages were fully liquidated at the instant the bank closed and the amount was definitely fixed.

Some argument is made on Pages 10 to 13 of said brief that plaintiff's action is for damages and sounds in tort. The first case cited on Page 11 of said brief merely states that the action is for damages for breach of the conditions of the bond; that is, it is an action for breach of the contract. There is nothing in said case holding that the action is not an action *ex-contractu*. The cases on Pages 11 and 12, holding that the bond is collateral security, do not in any way hold that an action on the bond is not an action *ex-contractu*. The Washington cases cited on Pages 11 and 12 of said brief were all cases in which the statute of limitations was involved, and the Court held that the bond, being in the nature of collateral security for the performance of an obligation by the principal, a discharge of the principal by reason of the statute of limitations discharged the surety and barred an action on the collateral security contract.

We call the Court's attention to the cases cited on Pages 29 and 30 of our former brief.

On Page 13 of said brief the statement is made

that plaintiff in error claims that the set-off in this case is statutory and not equitable. No such contention is made in our former brief, and we particularly refer to Page 28 of said brief wherein we stated that both by reason of the statutes of the state of Washington, and also in equity, the set-off should be allowed. We cited the Act of March 3rd, 1915, Section 274 (b), which makes it immaterial whether the set-off is of a legal or equitable nature. In either event the same can be pleaded in the Federal Courts in an action at law.

On Page 14 of said brief counsel states, with reference to the great number of decisions cited in our former brief relative to right of set-off, that he will not undertake to review them in detail. No distinction is pointed out between the cases cited and the case at bar, and we confidently assert that there is no distinction. Those cases hold that a surety's right upon the payment of an obligation of its principal relates back to the execution of the bond, and that the surety is to be deemed a creditor of the principal from the time of the execution of the bond, or, at the latest, from the time of the default of the principal. It was therefore, in the instant case, a creditor of the Kelso State Bank on account of the transactions arising out of the depository bond, at the latest, the instant the bank closed. Whether it could have brought any action against the bank until it had reimbursed the County Treasurer, is a question which is not involved, because, at the most, all that could be said would

be that the debt from the bank to it was not due until it had paid its obligation to the County Treasurer. The rule applicable to such cases is clearly stated in 34 Cyc. 674, as follows:

“* * * but where plaintiff is insolvent defendant may set off in equity a demand, although not yet due or payable, and he may set off against a matured debt assigned to plaintiff a debt not due at the time of the assignment, the assignor being insolvent.”

In reference to the case of *U. S. Fidelity & Guaranty Co. v. Maxwell* (Ark.) 237 S. W. 708, counsel states on Page 14 of his brief that the bonding company became surety for a depositor in the bank insuring the depositor against loss. This statement is not in accordance with the facts as stated in the decision in that case. The distinguishing feature in that case was that the bonding company had not executed a bond as surety, but had guaranteed the payment of the deposits in the bank by an instrument to which the bank was not a party, and that there was no privity between the bank and the bonding company. In other words, there was no relation of principal and surety existing, but the U. S. Fidelity & Guaranty Company had executed a policy of insurance insuring the depositor against loss, rather than a surety bond such as was executed in the instant case.

The distinction between these two cases is apparent. If an insurance company executed a policy of insurance covering an automobile, and the same

is damaged by a third party, the third party does not become the debtor of the insurance company unless and until the insurance company has paid the owner of the automobile for the damage and taken an assignment, there being no privity between the third party who injured the automobile and the insurance company. In the case of a surety bond, such as was executed in favor of the County Treasurer in this case, there was privity between the Kelso State Bank and the plaintiff in error, both being parties to that bond, the one principal and the other surety.

On Pages 16 and 17 of said brief counsel calls attention to the trust fund doctrine which prohibits an insolvent corporation from preferring one creditor at the expense of another. There is no question of preference in this case. All that the creditors of the Kelso State Bank are entitled to receive is their just portion of the assets of that bank. In a few early cases depositors in an insolvent bank were not permitted to set off their deposits against the amounts which they owed the the bank, on the theory that such a set-off would give a preference in violation of the statutes forbidding preference and requiring a ratable distribution of the assets. These decisions were based upon the erroneous assumption that the assets of a bank consisted of all amounts owing to the bank, regardless of whether the debtor had a claim against the bank. However, it is now well settled that the *assets* which the receiver is bound to distribute

ratably consist of the balance due to the bank from its debtors, after allowing such debtors to set off the amount of their deposits or other claims against the bank.

Scott v. Armstrong, 146 U. S. 499, 36 U. S. (L. Ed.) 1059.

Ann. Cas. 1917, C 1190 and cases cited.

In the case of *Scott v. Armstrong, supra*, the Supreme Court of the United States said:

“* * * Where a set-off is otherwise valid it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank.”

On Page 18 of said brief an analogy is attempted to be drawn between the amount owing on the cashier's bond and the liability of a stockholder, and the assertion is made that the sum due on the bond to the bank is a trust fund for the benefit of all of the depositors. It is true that the Courts have held that, in an action by a receiver of an insolvent bank against its stockholders to recover on their liability as stockholders or subscribers to the capital stock, the stockholders are not entitled to set off any debt which the corporation owes them.

These decisions are based upon the rule that the capital stock of a corporation and the stockholders' liability are trust funds for the benefit of all creditors, and that the only way such liability can be satisfied is by payment in cash. In the case of the capital stock of a corporation, or the stockholders' liability, the creditors have a right to rely upon the entire capital stock as an asset of the corporation, and in case of banks they have a right to rely upon the liability of the stockholders. These are funds which cannot be impaired or distributed otherwise than equally among the creditors in case of insolvency proceedings. They are assets which are capable of exact computation at all times, and because of their trust character the Courts will not permit set-offs. The obligation of the plaintiff in error, if any, is an obligation arising out of contract. If anything has become due on it, it is the bank's debtor, to that extent, in the same manner as if it had borrowed money from the bank and given its promissory note. In the absence of dishonesty on the part of the cashier causing loss to the bank, it was no asset at all. It was not something that the creditors could depend upon being paid in cash, in any and all events, in a certain definite amount. If the cashier was dishonest and his dishonesty has caused loss to the bank under the terms and conditions of the bond, plaintiff in error became indebted to the bank to the extent of such loss, but that indebtedness is no more in the nature of a trust fund than the indebtedness of

any other person to said bank. No cases have been cited by counsel holding that the amount due on the bond is a trust fund, and we confidently assert that there are no cases so holding.

On Page 20 of his brief counsel discusses the election of remedies, and contends that the presentation of a claim by plaintiff in error on account of having paid the County Treasurer on the depository bond constituted an election of remedies barring it from asserting the amount due from the bank as a set-off in the present action. None of the cases cited are in point and we do not believe that the law requires a party having a claim against a bank to refrain from presenting such claim until after the time for presentation of claims has expired, for fear that the officer liquidating the bank might sue him on another obligation. There is nothing inconsistent between presenting a claim and asserting the same as a set-off. The rule quoted from *Corpus Juris* on Page 20 of said brief refers to estates of insolvents and decedents, and states that the presentation of a claim will prevent the prosecution of an action or suit based upon an inconsistent remedial right. None of the cases cited hold that the presentation of such claim is inconsistent with setting off the same in case an action is brought by a receiver or administrator.

In the case of *Fishburne v. Merchants Bank of Port Townsend*, 42 Wash. 473, 85 Pac. 38, the Supreme Court of the State of Washington held that the presenting of a claim to an executor or

administrator is not a prerequisite to asserting it as a set-off, but that the claimants right was limited to the extinguishment of the debt sued on if no claims had been presented against the estate. If the claim had been presented against the estate, the Court would, in addition to allowing the set-off, have given the defendant judgment for the balance remaining due it after deducting the amount which it owed plaintiff. This case was followed and is cited with approval and quoted from in *Re Adler's Estate*, 116 Wash. 484, 199 Pac. 762.

COMMON LAW BONDS

On Pages 36 to 46 of said brief it is contended by defendant in error that the bonds in this case were statutory bonds. In the cases cited by defendant in error the bonds contained the provisions of the statute, and were given in an attempt to comply with the statute; while in this case, as counsel states on Page 43 of their brief, "it is true that it does not appear that the bond in this case was furnished directly in pursuance of the statute." Furthermore the bonds do not contain the conditions required by statute; were not pleaded as statutory bonds; are not void for want of form or substance, recital or condition; are good and valid common law bonds; and no reformation of the same has been asked. The complaint in this action is based upon the obligations of the bonds as written, and the contention that the same are statutory

bonds was a mere afterthought on the part of counsel for defendant in error.

Whatever the rule may be in other states, the Supreme Court of the State of Washington has expressly decided that if the bonds do not meet the requirements of the statute they are not statutory bonds, but common law bonds.

Smith v. Tukwila, 118 Wash. 266, 203 Pac. 369.

The bond in question in the case last above cited was a bond given pursuant to Section 1159 *et seq.* Remington's Code, which section reads, in part, as follows:

"Whenever any board, council, commission, trustees or body acting for the state or any county or municipality or any public body shall contract with any person or corporation to do any work for the state * * * such board, council, commission, trustees or body *shall require* the person or persons with whom such contract is made to execute and deliver to such board, council, commission, trustees or body a good and sufficient bond * * *"

The conditions of such bond are expressly set out. In discussing this case the Supreme Court said:

"The bond here does not meet any of the requirements of the statutes. It had but one surety and was not for the full amount of the contract price. The bond is, therefore, not a statutory bond, and the question is whether it is good as a common law bond. We take it

that the statutes cited do not compel the municipality to exact the bond there provided for, but that it may elect to proceed with the work under other guarantees of its performance, taking the risk incident to failure to secure the statutory bond. There is no question that the appellant accepted the bond in good faith at the time it entered into the contract, and, so long as the law does not provide that the municipality shall not take a bond other than that provided for in the statute, or that such bond, if taken, shall be without effect, we are constrained to hold that the bondsman will be liable as upon the common law bond. *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, 39 Pac. 280; *Pacific Bridge Co. v. United States F. & G. Co.*, 33 Wash. 47, 73 Pac. 772."

It will be noticed that the statute in the above case expressly provides that the board, council, commission, etc., *shall require a bond*. The statute further contains the provisions of the bond and the terms of the same.

Paraphrasing the above language, it might be stated in the instant case that the statutes would not compel the bank to exact the bond there provided for, but that it may elect to continue the cashier in office under other guarantees, taking the risk incident to failure to secure the statutory bond. Furthermore, there is no statute which prohibits the bank from taking other or additional bonds

covering a cashier, than the bonds provided by statute. The bond not having been given pursuant to statute, and not containing the conditions required by statute, plaintiff in error could very well have assumed, granting that it was familiar with the statute (of which there is no evidence), that the bond which it continued in force after the passage of the statute, and the bond which it executed after the passage of such statute, were other or additional bonds than those required by statute.

KELSO FARM COMPANY NOTES

On Page 33 of the brief of defendant in error the statement is made that the \$6,000 referred to in a resolution of January 11th, 1921, which was a resolution by the board of directors of the Kelso State Bank authorizing a loan to F. L. Stewart in the amount of \$6,000, was in the claim presented to plaintiff in error, but was not pressed because of the resolution of the board of directors, and that this resolution had nothing whatever to do with the loan to the Kelso Farm Company, but referred entirely to another matter.

We beg to call the Court's attention to the \$6,000 referred to as being in the claim presented, which is the last item in the claim, Exhibit "16," and to the minutes of December, 1920, Exhibit "2-A." Said minutes read as follows:

"Two principal matters were up for discussion, namely the suggestion of the bank examiner that \$6,000 of the Max Johnson paper

be retired. A resolution of the board of directors was passed as follows:

‘Resolved, that the board of directors of the Kelso State Bank hereby authorize F. L. Stewart to retire \$6,000 of the Max Johnson paper, giving his note temporarily for the purpose until he is able to take care of the item in cash. Letter of authorization of George L. Marsh is attached to this resolution. This resolution was passed unanimously.’ ”

The claim presented and the allegation of the complaint, Record 12, show that Stewart executed a note on December 18, 1920, to the Kelso State Bank, in the sum of \$6,000. This was the note that was used to retire worthless paper held by the bank and signed by Max Johnson, and this was the note that counsel claims was not pressed because of the resolution of the board of directors of January 11th, 1921. A reference to the resolution of January 11th, 1921, shows that a loan to Mr. Stewart was authorized in the sum of \$6,000. Certainly counsel does not contend that the placing of his note in the bank to retire worthless paper held by the bank was a loan to the cashier. Such an action does not meet the definition of a loan—either in its popular or technical sense. This note was placed in the bank to retire worthless paper held by the bank in accordance with the written guaranty which Mr. Stewart had executed on May 26th, 1919, which guaranty is contained in the minutes as part

of Exhibit "2-A," whereby Stewart guaranteed the paper held by the bank to the extent of \$50,000.

Under the statutes of the State of Washington, making it a felony for an officer of a bank to borrow money from the bank without having previously been authorized so to do by a resolution of the board of directors, and the decisions in the cases of *State v. Larsen*, 119 Wash. 259, 205 Pac. 373, and *State v. Lindberg*, 25 Wash. Dec. 128, a resolution passed on January 11th, 1921, authorizing a loan which had been made on December 18, 1920, would have been an idle ceremony, and would not have protected either the cashier or other officers of the bank.

No other loan having been made to Stewart after the resolution of January 11th, 1921, except the two Kelso Farm Loans, the Court cannot escape the conclusion that these loans were authorized.

The various other questions raised in the brief of defendant in error have been fully covered in our former brief.

Respectfully submitted,

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THOMAS E. DAVIS,

Attorneys for Plaintiff in Error.

United States Circuit Court of Appeals

For the Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
a Corporation,

Plaintiff in Error,

vs.

JOHN P. DUKE, Supervisor of Banking of the
State of Washington, liquidating the KELSO
STATE BANK,

Defendant in Error.

Upon Writ of Error to the United States District Court for the
Western District of Washington, Southern Division.

HON. EDWARD E. CUSHMAN, *District Judge.*

Reply Brief of Defendant in Error

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United States Circuit Court of Appeals

For the Ninth Circuit

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
a Corporation,

Plaintiff in Error,

vs.

JOHN P. DUKE, Supervisor of Banking of the
State of Washington, liquidating the KELSO
STATE BANK,

Defendant in Error.

Upon Writ of Error to the United States District Court for the
Western District of Washington, Southern Division.

HON. EDWARD E. CUSHMAN, *District Judge.*

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Plaintiff in Error has filed a reply brief, a written copy of which was handed to us at the opening of the oral argument and we had no opportunity of meeting the new matters until after the close of the oral argument and the service upon us of the printed brief.

We now ask permission to file a brief reply to the

new matters now urged for the first time by the plaintiff in error and not covered in the opening brief.

SET OFF

Counsel has again called the court's attention to *United States Fidelity & Guaranty Co. vs. Maxwell*, 237 S. W. Rep. 708, and has given that case a construction which we think the decision does not warrant. In this case the plaintiff had issued a policy of insurance to a bank covering the dishonesty of two employees of the bank. The two employees were guilty of fraud and the bank suffered a loss. The bank became insolvent and action was brought by the bank examiner upon these policies of insurance. At the time of the failure of the bank a depositor had on deposit in the bank a sum of money and held a policy of insurance issued by the same guaranty company to indemnify the depositor against loss; the guaranty company paid the loss of the depositor and took an assignment of the claim against the bank and filed it for allowance. In the action brought by the bank examiner the guaranty company undertook to off-set this claim against its liability upon the insurance covering the dishonesty of the employees of the bank and the Supreme Court of Arkansas held that it was not entitled to the off-set, and that was the question before the court.

We have quoted from this decision in our answer brief. The court held that

“The right of set-off exists only to the extent of the concurrence of the two claims, and in case of insolvency proceedings under a statute prohibiting preferences the concurrence of claims must have existed before insolvency occurred and the proceedings were instituted . . . and that the right of subrogation carries with it the securities held by the original claimant, but this does not extend to the right to set off a claim which the party entitled to subrogation did not own prior to that time. If appellant be allowed to set off this claim the effect would be to give it a preference on a claim against the bank acquired subsequent to the time that the bank became insolvent and passed into the hands of the receiver.”

Counsel has cited *Scott vs. Armstrong*, 146 U. S. 499. In this case a note was executed to a bank and the amount placed to the credit of the maker on the books of the bank. The maker of the note had no reason for thinking that the bank was insolvent, but the managing officer knew it to be insolvent. Before the note matured a receiver was appointed and the court held that the undrawn balance should be allowed as an equitable set-off to the note and that such an allowance would not constitute a preference.

Quoting from that decision:

“The state of case where the claim sought to be off-set is acquired after the act of insolvency is far otherwise, for the rights of the parties become fixed as of that time, and to sustain such

a transfer would defeat the object of these provisions.”

Quoting further from that decision:

“Indeed, natural justice would seem to require that where the transaction is such as to raise the presumption of an agreement for a set-off it should be held that the equity that this should be done is superior to any subsequent equity not arising out of a purchase for value without notice. In the case at bar the credits between the banks were reciprocal, and were parts of the same transaction, in which each corporation credited to the other on the faith of the simultaneous credit, and the principle applicable to mutual credits applied. It was, therefore, the balance upon the adjustment of the accounts which was the debt, and the Farmer’s Bank had the right, as against the receiver of the Fidelity Bank, although the note matured after the suspension of the bank, to set off the balance due upon its deposit account, unless the provisions of the national banking law were to the contrary.”

The court will notice that it is an entirely different case from the one now before the court. In the case cited the matter grew out of the same transaction, was concurrent and mutual; it did not involve the question of the trust funds involved in our case. In the case now before this court the claims are not mutual, not concurrent, and do not grow out of the same transaction; the sum due on the cashier’s bond is a trust fund belonging to the depositors; it did not

belong to the bank at the time the receiver took charge; did not belong to the bank at the time the depositary bond was given to the county, for the bank was insolvent at that time and this was then a trust fund belonging to the depositors and cannot be off-set against a liability which the bank incurred thereafter in an independent matter.

This court will find a very recent decision of the Supreme Court of Washington of importance upon this question. The case is *Woods, Trustee in Bankruptcy, vs. Metropolitan National Bank*, decided September 19, 1923, reported in Vol. 26, No. 8, Washington Decisions, page 330. In this case a corporation became indebted to numerous parties and also gave the defendant bank some notes amounting to about \$5500.00. The corporation was insolvent. After actual insolvency but before bankruptcy payments were made on the notes. The action was brought by the trustee in bankruptcy to recover from the bank the money paid on the notes while the corporation was actually insolvent. The court in passing on the question quotes from *Thompson vs. Huron Lbr. Co.*, 4 Wash., 600, which holds that:

“Its property, on insolvency, becomes a trust fund for the benefit of all of its creditors to be equally and ratably distributed among them.”

And, quoting from this recent decision:

“But it is not our understanding of the trust fund doctrine that a bank, having possession of property of an insolvent corporation, acquired

after the corporation becomes insolvent, has no greater right to sequester the fund of the satisfaction of an obligation to it than has the individual creditor of the corporation. The theory of that doctrine is that all of the assets of a corporation, immediately upon the insolvency of the corporation, become a trust fund for the benefit of all of its creditors, and that thereafter no liens or rights can be created, either voluntarily or by operation of law, whereby one creditor is given an advantage over others."

And the court held in this case that the trustee in bankruptcy was entitled to recover money paid upon the notes for when the corporation became insolvent its property became a trust fund for the benefit of all of its creditors.

COMMON LAW BONDS

Counsel called the court's attention to *Smith vs. Tukwila*, 118 Wash. 266, and claim that this case is decisive of this question. So far as we are able to tell the case has little or no bearing upon the question. The court in that case was passing upon a contractor's bond. The bond had only one surety, did not comply with the law in that particular, and was not for the full amount of the contract price. The court held that it did not meet the requirements of the statute. The court says:

"We take it that the statutes cited do not compel the municipality to execute the bond there

provided for, but that it may elect to proceed with the work under other guarantees of its performance, taking the risk incident to failure to secure the statutory bond."

This decision is in line with other prior decisions of the Washington court to the effect that the failure of a municipality to take a bond renders the municipality liable. It may or may not take the bond; if it wants to escape liability itself it must exact a bond, otherwise it becomes responsible. The bond required to be given by bank officials is an entirely different matter. The bank officers are given no discretion but are required to take the bond, not only for the protection of the bank but for the protection of the depositors of the bank. It is obligatory and mandatory and there is no question of discretion about it.

In the case of *United States Fidelity & Guaranty Co. vs. Poetker*, L. R. A. 1917-B, 984, cited by us in our answer brief, the Supreme Court of Indiana in passing upon a statute similar to ours said:

"It will be noted that while this statute leaves the amount of the bond to be fixed at the discretion of the board of directors, it is mandatory upon them to exact a bond from each of the officers named, and by its terms states the simple condition upon which it must be given in clear and unmistakable words; namely, that the officer will honestly and faithfully discharge his duties as such officer during his continuance in office."

There is a wide difference between the bond in

the *Smith-Tukwila* case and the bond in our case. In the Smith case the bond was not given by the number of sureties required by law; it did not comply with the requirements of the law; in our case the law requires a surety bond. A surety bond was given; while the amount was not previously fixed by the directors the bond was accepted and the amount thus ratified and fixed. The only difference is a slight change in the wording of the condition, as we have called to the court's attention in our answer brief; the meaning is the same, covers the same liability, and reaches the same purpose. We would call the court's attention to the fact that among the exhibits offered in evidence in this case the court will find that the banking officers who examined the bank from time to time reported to the state bank examiner that this bond was given and was in force; thus it was recognized by the state banking officers as a valid, existing bond.

KELSO FARM COMPANY NOTES

Counsel contend that the so-called resolution of the board of directors of January 11, 1921, did not refer to the \$6,000.00 note given by Stewart to cover the Max Johnson paper. There is among the exhibits a letter from Marsh, one of the directors, dated a few days before this so-called resolution was passed, calling the directors' attention to this very matter, and while the note may have been dated previously

the entire record must convince the court that this was an attempt to ratify the giving of that note by Stewart. In the claim presented to the Guaranty Company this note was listed but not urged. There is nothing in the record to show that the resolution as passed was intended to cover loans made to the Kelso Farm Company; there is nothing to show that the directors had any knowledge that the Kelso Farm Company was Stewart's own company. It was formerly a corporation; it had been dissolved and the corporate name was continued; there is nothing to show that Stewart was authorized to take the money from the bank under an assumed name; there is nothing which connects this attempted authorization with this loan. But the attempted resolution was wholly without force and effect; it could not be an authorization to Stewart to take the money from the bank; the resolution not being passed as required by law cannot be given any force; it cannot have the effect of a ratification, for the law expressly provided that loans to an officer of a bank can be made only in the manner provided by law. At the time this pretended resolution was passed the bank was insolvent and Stewart knew it was insolvent and his withdrawing the funds from the bank at that time, even though authorized, was in violation of law and acquiescence by other directors could not give it force or effect.

In our answer brief we quoted from *State vs. Lindberg*, reported in Vol. 25, No. 1, Washington Decisions, p. 128, and we again want to call the

court's attention to this decision which holds that the law makes the borrowing officer guilty of a felony if the borrowing is in violation of the provisions of the act. One of the provisions of the act is that the borrowing officer must not be present when the resolution is passed. In this case the records show that when this attempted resolution was passed that Stewart was present. The court in the Lindberg case held that the crime was complete when the borrowing was consummated without a compliance with the statutory requirements, and in *State vs. Larson*, reported in Vol. 22, Wash. Dec., No. 10, page 471, cited by us, the court held that the mere fact that the transaction may take the form of a loan would not necessarily deprive it of its criminality. Quoting from that decision:

“And that if such acts were consummated under the guise of a bona fide loan made with the assent of the other officers of the bank, such would not eliminate the criminality of the act and that the fraud itself might be inferred from the misappropriation of the funds.”

There can be no question but what Stewart took the money from the bank in this instance fraudulently and with a guilty intent and design to misapply the same, for at that time he must have known of his own insolvent condition and inability to repay the bank, and the insolvent condition of the bank.

It seems, therefore, clear that the embezzlement of

these funds by Stewart falls within the conditions of the bond.

Respectfully submitted,

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